Supreme Court, U.S.
FILED

951915 MAR 21 1996

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

RICHARD SCHULZE,
Petitioner,

v.

U.S. COMMODITY FUTURES TRADING COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Dated: May 24, 1996

Richard Schulze, *pro se*
Room 1850-ACM
16 North Wabash Avenue
Chicago, Illinois 60602
(312) 263-4161
Fax (312) 263-5832

15 pp

QUESTIONS PRESENTED

1. Whether in injunctive law summary judgment may be employed as a means to grant to a federal agency such as the Respondent Commodity Futures Trading Commission ("the CFTC") jurisdiction which is denied it under the tenth amendment to the Constitution for the United States, under the statutes of the several states, and under federal statute?

2. Whether the federal courts may be permitted to abdicate their constitutional and statutory responsibilities by acting as mere ombudsmen for federal agencies such as the CFTC herein?

3. Whether the CFTC or any federal agency may be excused from proving jurisdiction over a particular subject area merely by having the good fortune to be awarded summary judgment, when such summary judgment is awarded solely as a sanction against several members of a group of civil defendants, when the effect of the said sanction is against those not deemed sanctionable as well as against those who, however incorrectly, have been deemed sanctionable, and especially when the said sanction was based not on the merits?

4. Whether the CFTC has or ever had grounds to attempt to assert jurisdiction over the business which is the subject of this proceeding and which was operated by the Petitioner herein?

5. Whether, in such pursuit, the CFTC may be exempted from observance of the principle of laches?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF CONTENTS, APPENDIX	iv
STATUTORY PROVISIONS INVOLVED	v
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
INTRODUCTION	3
HISTORY OF THE CASE	4
ALLEGATIONS IN THE DISTRICT COURT	6
STATEMENT OF THE ISSUE ON APPEAL	6
FAILURE OF FEDERAL JURISDICTION	8
LACHES	15
THE INCANDESCENT LINE	16
THE COLORADO RESOLUTION	22
BYPASS OF JURISDICTIONAL ISSUE	23
REASONS FOR GRANTING THE WRIT	26
CONCLUSION	29

APPENDIX

1. Opinion of the Court of Appeals for the Ninth Circuit (September 26, 1995) APP 1

2. Summary Judgment of District Court (July 28, 1993) APP 42

3. Order/Permanent Injunction of District Court (July 28, 1993) APP 49

4. Preliminary Injunction of District Court (February 19, 1992) APP 68

5. Temporary Restraining Order of District Court (February 7, 1992) APP 81

6. Ex Parte Restraining Order of District Court (January 16, 1992) APP 93

7. Order of the Court of Appeals denying Motion for Rehearing (December 22, 1995) APP 97

STATUTORY PROVISIONS INVOLVED

1. The Colorado Resolution APP 98

2. Constitution for the United States: Amendment X APP 100

3. Excerpt from 7 U.S.C. §2 APP 100

4. Uniform Commercial Code, Pertinent exerpts APP 101

OTHER ESSENTIAL MATERIAL

1. Terms and Conditions of Sale, Noble Metals International Inc. APP 105

2. Terms and Conditions of Sale, Wynwood Mercantile Corp. APP 113

TABLE OF AUTHORITIES

There is no case law given herein, in that on knowledge and belief of Petitioner, no precedent exists.

OPINIONS BELOW

The Ninth Circuit's opinion of September 26, 1995 is reported at 67 F. 3d 766 (9th Cir. 1995) and reproduced at APP 1.

On November 9, 1995 petitioner filed a timely Motion for Rehearing which was denied on December 22, 1995. (Order denying rehearing reproduced at APP 97.)

The Ninth Circuit's judgment partially affirmed and partially reversed orders of the Federal District Court for the District of Nevada dated July 28, 1993; February 19, 1992; February 7, 1992; and January 16, 1992. (Orders reproduced at APP 42, 49, 68, 81, and 93.)

This Petition is timely filed within 60 days of letter from Clerk of the Court dated March 26, 1996 citing deficiency in initial filing.

STATEMENT OF JURISDICTION

Jurisdiction in the court of appeals to review the orders rendered by the district court rested upon 28 U.S.C. §1291:

> "Final decisions of district courts. The courts of appeals..shall have jurisdiction of appeals from all final decisions of the district courts of the United States.."

28 U.S.C. §1254:

> "Circuits in which decisions reviewable..appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows: (1) From a district court of the United States to the court of appeals for the circuit embracing the district.."

Jurisdiction of this Court is invoked under 28 U.S.C. §1253:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

28 U.S.C. §1254:

> "Courts of appeals; certiorari; ..Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.."

INTRODUCTION

This proceeding is a locus classicus of abuse of injunctive law, and a straight tenth amendment violation in that no jurisdiction over the subject matter herein exists at the federal level.

Here we see a thoroughgoing usurpation of jurisdiction by federal authorities, contrary to the division of sovereign powers set forth in the tenth amendment to the Constitution for the United States, contrary to the provisions of the Uniform Commercial Code as enacted by the several states, and contrary to the specific federal mandate of exemption from jurisdiction at 7 U.S.C. §2.

Noble Metals International ("Noble") and Moorgate Ltd., ("Moorgate") principal defendants herein, sold a standard forward delivery contract pursuant to the Uniform Commercial Code ("UCC") as enacted by the several states. The contract was classical in form and in all respects a garden variety state regulated commercial vehicle. The delivery procedures under the contracts permitted utilization by customers of an agent in the precise manner spelled out in the UCC.

Imposition of summary judgment in the district court as a "sanction" against two of the six original defendants enabled the Plaintiff

conveniently to evade the necessity of establishing jurisdiction over the subject matter herein.

Neither the district court nor the appeals court ever addressed the central issue in this case, because they would have been unable to do so. No answers to the jurisdictional issues raised by Petitioner have been, or could be, provided by them. Thus, the threshold of federal jurisdiction was never reached in this action.

Through these and other firms, Petitioner had offered such contracts since 1982, with full knowledge of the Plaintiff. In violation of the principle of laches, Plaintiff brought this action in 1992, nine years after it knew of the activity, belatedly alleging violation of the U.S. Commodity Exchange Act ("the Act").

HISTORY OF THE CASE

On January 16, 1992, the Defendants herein were placed under receivership and the business of Noble and Moorgate was terminated pursuant to an ex parte restraining order (APP 93) of the Federal District Court for the District of Nevada, based on allegations by the CFTC of purported violations of the Act.

Without any material hearing or any consideration of real evidence, the Court imposed a Temporary Restraining Order (APP 81), and

then with absolutely no hearing a Preliminary Injunction (APP 68).

The ex parte order was unjustified in that there was no public emergency, since the defendants had discontinued sale of their financial product six months prior.

As part of a strenuous discovery schedule, including depositions in London, England and all over the U.S., Noble an . Moorgate were noticed to produce a representative for deposition who would not invoke fifth amendment protection. It was not possible for them to produce such a person. Although each person competent so to appear gave extensive testimony in their individual capacities, the Court without further hearing issued a finding of willful refusal by Noble and Moorgate to produce a representative for deposition and, solely as a discovery sanction, postulated all of the allegations as "deemed admitted" and rendered summary judgment against all of the defendants, and not merely against the two defendants purportedly sanctionable.

The CFTC has never presented any evidence, witnesses, or testimony to support its claim in such manner as to provide the Defendants with opportunity to cross examine the witnesses and to test their credibility and the accuracy of the contents of the declarations submitted.

THE ALLEGATIONS IN THE DISTRICT COURT

The sole claim of jurisdiction in this proceeding was that the offer and sale of the Noble forward delivery contracts constituted contracts for future delivery and, as such, were required to be offered and sold on a designated commodity exchange.

That is, the CFTC alleged that the Noble Forward Delivery Contract comprised an "illegal off market futures contract," and that the Defendants herein have therefore acted in violation of the Act.

STATEMENT OF THE ISSUE ON APPEAL

Notwithstanding the parade of abuses of due process experienced herein this appeal is confined to the narrow issue of jurisdiction. Since in fact no jurisdiction herein exists at the federal level, the relief prayed for will render moot all of the other abuses which followed upon the orders of the district court and the appeals court. Specific citation of any such abuses herein are solely to underline the general egregiousness which has characterized this action.

The various opinions and orders of the lower courts have not addressed the most fundamental issue in this case. The CFTC has presented no

case for jurisdiction. Because summary judgment was awarded on a technicality, leading to the absence of a trial on the merits, the lower courts never addressed the question of jurisdiction.

a. The CFTC has failed to allege that the Noble contract falls outside of the scope of a forward delivery contract as defined in the UCC, nor cited any state authority which has found that the Contract does not qualify as such.

b. The CFTC has failed to allege any specific violations of any specific provisions of the UCC by the defendants in their sale of the Contract, in the delivery procedures employed, nor in any agency functions carried out in connection with any deliveries made under the contracts.

c. The CFTC has failed to produce any definition of the terms "contract for future delivery", "forward delivery contract" or "delivery" at the federal level. Neither has the CFTC, in the absence thereof, given any reason why the Tenth Amendment to the United States Constitution should not hold to bar any further prosecution in this case.

d. The CFTC has failed to allege that the extensive dealings which Noble and Moorgate have had with various state securities agencies and other state authorities, or any other regulatory efforts by the several states have been inadequate

to protect the public, or that the prior efforts of the states to exert jurisdiction are inappropriate.

e. The CFTC has failed to allege that the definition of "contract to sell goods at a future time" or "forward delivery contract" as promulgated by the several states under the UCC is not the appropriate definition to which to have resort in construing the exemption under the Act at 7 USCS §2, nor has the CFTC cited any other definition by any other authority which should apply here, or why such other definition should be given precedence over that in the UCC.

FAILURE OF FEDERAL JURISDICTION

In their defense, the Defendants have argued herein and had placed before the district court: 1.) that the Contract constitutes a forward delivery contract as defined by the several states in the UCC; 2.) that the Contract was sold, the deliveries pursuant thereto made, and the agency functions therewith connected carried out, in full compliance with the requirements of the UCC as promulgated by the several states, especially Rhode Island, Colorado, and Nevada; 3.) that no federal agency has attempted to define forward delivery contracts or to assert jurisdiction thereover; 4.) that the Tenth Amendment to the Constitution for the United States therefore holds; 5.) that the several states are well within their rights in asserting jurisdiction thereover; 6.)

that they have indeed done so; 7.) that in asserting their jurisdiction over forward delivery contracts the several states are exercising their legitimate rights pursuant to the Tenth Amendment of the Constitution; 8.) that this has been specifically ratified at the federal level by the U.S. Congress, in that section 2 of the Act specifically exempts forward delivery contracts from federal jurisdiction under the Act, and therefore from the overview of the CFTC; 9.) that the CFTC therefore erred in bringing this action; and 10.) that the Defendants should be permitted to resume deliveries to their customers.

Prior to initiation of this proceeding by the CFTC, the Defendants had been engaged in regulatory intercourse with a number of state agencies, which agencies were and are entirely competent to address and to resolve the appropriate issues.

The opinion of the appeals court states in part:

> "..In practice, no metal changed hands; a third party would receive and deliver the metals through paper transactions. There was no expectation that customers would take actual delivery.."

The opinion also quotes such irrelevant cases as Co Petro. and goes on to assert that "the

delivery requirement cannot be satisfied by..transfer of title". Contrary to this statement, however, the device of a transfer of title is the very definition of the legal concept of the term "delivery" in the UCC. The above assertions thus fly in the teeth of everything known and accepted in commerce and defined in the UCC.

Such statements constitute a bundle of logical *non sequiturs*, in that "paper transactions" in form of indicia of title such as employed by Noble, clearly shown in the record herein, constitute veritable textbook definition of delivery under the UCC, and in that the bounds of permissible agency function are also clearly spelled out in the UCC and were demonstrated to have been properly observed by Noble in its delivery transactions, in full compliance with UCC requirements.

By the Ninth Circuit's own assertion in Co Petro and its progeny, non availability of the Sec. 2 cash forward contract exclusion in the Act requires that the contract must be predicated upon absence of real expectation of actual delivery of the commodity by seller to buyer.

However, before such a test may be applied at the federal level jurisdiction must first be established by clear evidence that the contract to be reviewed lies outside of the definition of, and is not in compliance with, the UCC. Only then,

pursuant to the tenth amendment, could it be contemplated that such contract might be eligible to be brought into the federal domain. Forward delivery contracts under state law are specifically permitted to the general public for speculative purposes, and the conditions permitting such speculative use are specifically set forth in the respective commodity codes in the statutes of the several states [Cf: Model State Commodity Code as promulgated by the North American Securities Administrators Association and enacted into law by many states] The Co Petro opinion prohibiting speculative use for other than futures contracts represents federal judicial fiat only, and does not reach to contracts under exclusive state jurisdiction.

The statement in the opinion of the appeals court that only a handful of Noble customers contemplated actual delivery is just not so. Delivery was and is of the essence in the Noble contracts. The CFTC has failed to produce any customer whom Noble presented as having received delivery but who does not believe he or she actually received delivery. To say that transfer of title does not constitute delivery is tantamount to saying that black is not black, but white. "Physical delivery" does not require that a human hand must lift bodily the object to be delivered, must carry it over some distance, and must thrust it into the pulsating hand of the recipient. Nothing in commerce is so primitive as that.

Delivery by indicia of title is a text book definition of delivery, and the only sure manner in which to establish secure ownership. Indeed, formal delivery cannot be effected absent indicium of title, as one can own nothing to which one does not hold title. Title, whether written or not, is the sole evidence of right of ownership. Absence of indicia of title is a palpable weakness and attenuates security of ownership. Delivery by means of indicia of title lies at the very heart of commercial intercourse in the Western World, dating to well before the dawn of the Christian era. Therefore, to say that conveyance by indicia of title does not constitute delivery is to say that a carrot is not a vegetable.

Further, the summary judgment, being but a sanction, cannot represent, or be taken as, a legal finding on the merits of the regulatory status of the Noble program. "Deemed admitted" by Noble does not announce to the world that its Forward Delivery Program was in fact sold in violation of the Act, or that the subject matter "admitted" represents a final legal determination carrying objective force.

The defendants herein do not possess legal authority such that their "admission" of a legal conclusion would be binding upon any other party. "Deemed admitted" as a sanction can be appropriate in the case of private parties for damages. However, it cannot be utilized here, in

that "deemed admitted" as to a violation of a statute would tend to create case law whose authority rests not upon duly determined findings of a legally qualified court but upon purported de facto pleadings of a private litigant having no legal qualifications to teach principles of law.

There were and are triable issues of material fact on the jurisdictional questions herein. Absent the issue of summary judgment as sanction, such a trial should have taken place. The right to such trial was lost by many parties other than those deemed sanctionable, especially including the Noble customers who have eleven million dollars at stake. Summary judgment affecting all of these parties in interest should not be available to the district court as fit sanction for the purported legal deficiencies of two corporate defendants.

The dissenting opinion of Justice Reinhardt in the Ninth Circuit reinforces the arguments militating against the sanction which was imposed. The said dissenting opinion is hereby incorporated herein by reference as an integral component of this Petition.

The defendants in a case of such complexities and subtleties as this should have been entitled to adduce actual evidence in a hearing before the Court. In such a hearing, the Defendants would easily have exposed the nine "customer

declarations" as extensively ghost written by attorneys of the CFTC, would have verified as a false report the CFTC's allegation that General Bullion Corporation ever served as a delivery agent for any Noble Forward Delivery customer; and would have proved that Terrence Hill had falsely repudiated his ownership of Jonathan Labrey Ltd, the actual delivery agent for forward delivery customers.

The Defendants' pleadings have made clear that Section 2 of the Act exempts "cash commodity for deferred shipment or delivery.." They also showed that the UCC [Cf: Colorado 4-2-106(1) and Rhode Island 6A-2-106(1)] asserts jurisdiction over any "contract to sell goods at a future time.." Both "cash commodity for deferred shipment or delivery.." and "contract to sell goods at a future time.." are synonyms for what is commonly called in the industry "forward delivery contract". This has not been challenged by the CFTC, and remains undisputed in this proceeding. That is, the CFTC has failed to allege that there is any distinction separating these three cited terms, which have been used interchangeably throughout the pleadings in this proceeding, and the CFTC has therefore ceded any right to challenge this comity of nomenclature. This petition has standardized on the term "forward delivery contract" to represent all three of these appellations which refer to the same thing.

LACHES

In 1987, the State of Florida initiated an action against Wynwood Mercantile Corporation and Richard, Theodora, and Otto Schulze as its principals, alleging violations of the Florida Securities Act. This action resulted in an agreed Order, which dismissed Richard Schulze and the other principals of the company *nunc pro tunc*. The CFTC, although invited by the State to participate as a party plaintiff in that action against Wynwood, declined to participate on grounds of lack of jurisdiction over the Wynwood program.

The CFTC in its investigation of Wynwood had reviewed and considered both the Terms and Conditions of Sale for the Wynwood Extended Delivery Contract and the delivery mechanism utilized by Wynwood to satisfy its delivery obligations to purchasers, including the agency functions carried out in connection therewith.

Subsequently, the Noble Forward Delivery Program was initiated and was so structured as to be absolutely identical with the Wynwood program in all aspects related to the UCC. Thus, Noble and its customers entered into the contracts in good faith, based upon reasoned judgment from the CFTC's prior public statements that the activity of Noble in offering these transactions to the public would not offend the Act.

Indeed, Richard Schulze had received and relied upon an opinion of New York Securities counsel that transactions of this type were cash market transactions, and were not offensive to the Act. Moreover, Mr. Schulze had sought and obtained an opinion of separate counsel that the delivery process utilized by Wynwood, and later by Noble, was a legally authorized and competent method of delivery under the UCC.

At initiation of this proceeding, Dennis M. O'Keefe, Chief of the Bureau of Enforcement of the CFTC, declared in open court: "..Noble is just Wynwood no. 2.." The sudden about face of the CFTC in bringing this action thus ensnared a host of unsuspecting Noble customers, all innocent victims of the dishonoring by the CFTC of the long established principle of laches.

THE INCANDESCENT LINE

The Section 2 exemption in the Act divides all commodity contracts into two universes.

The first universe, that of forward delivery contracts, is specifically exempted from federal overview under the Act. This denial of jurisdiction is acknowledged by the Congress in the Act in recognition of the specifically asserted jurisdiction by the several states under the Uniform Commercial Code, as is their right under the tenth amendment to the U.S. Constitution.

The second universe encompasses all other commodity contracts. These may include futures contracts, spot cash contracts (many of which may also be under jurisdiction of the several states), and all other hybrid or variant commodity contracts for instant or deferred delivery, such as those of Co Petro et al. It is from this second universe of "other" contracts that the CFTC may identify, and the federal courts may confirm, legal or illegal futures contracts subject to CFTC jurisdiction. Neither the CFTC nor the federal courts may reach to any contracts which lie within the first universe of forward delivery contracts to deliberate over their relative merits, or to attempt to brand them as being in violation of federal law.

Only if the CFTC can demonstrate that a given contract fails in compliance with the requirements of state law under the Uniform Commercial Code may the CFTC attempt to move a given contract from the first universe of forward delivery contracts into the second universe of "other" contracts.

This division of two universes establishes a threshold requirement which must be addressed before any deliberations may be commenced at the federal level concerning those facts and circumstances surrounding a given contract vehicle which determine whether it may fall under CFTC jurisdiction. Such deliberations may take

place if and only if the contract vehicle can be taken from the first universe of forward delivery contracts and brought into the second universe of "other" contracts.

As previously detailed, the CFTC has taken no legal steps to remove the Noble forward delivery contract from the first universe of forward delivery contracts. As shown in earlier pleadings the CFTC failed to allege any specific failure of the Noble contract to meet the definition of forward delivery contract under the UCC, nor any manner in which the operating procedures of Noble failed to comply with requirements set forth under the UCC.

The CFTC's attempts to establish that the Noble Forward Delivery Contract is not an exempt transaction are confined solely to federal case law. This, however, is to no avail because a) there is by the CFTC's own admission no definition in any federal statute of the term "forward delivery contract"; b) the federal government therefore lacks legal competence to define the said term; c) the statutes of the several states do define the term; d) the said states therefore possess legal competence to define the term; e) the several states do assert jurisdiction over such contracts as is their right, and e) the Section 2 exemption in the Act acknowledges this, thus clearly ceding exclusive jurisdiction over forward delivery contracts to the several states.

The CFTC and the federal courts may "view" a contract "..with a critical eye toward its underlying purpose.." or deliberate over the validity of delivery procedures, but it may do so only with respect to contracts which have already been brought into the domain of the second universe of "other" contracts. To bring a given contract vehicle into such second universe requires proper legal steps. The CFTC has taken no such steps.

The various opinions below reiterate that there is no "bright line definition" distinguishing futures contracts. However, the line which distinguishes forward delivery contracts is positively incandescent.

Neither Co Petro nor any of the other defendants in the many prior cases as cited *ad nauseam* by the CFTC ever made claim that their programs were forward delivery contracts as defined by the UCC, nor that such contracts were in compliance therewith. Thus, the findings against those defendants by the Ninth Circuit were proper as to the circumstances therein.

In Co Petro and its progeny, it was unnecessary for the CFTC to mount any formal procedure to place those contracts into the second universe of "other" contracts, in that none of those defendants alleged that their hybrid contracts belonged in the first universe of forward

delivery contracts as defined by the UCC. The Co Petro defendants and their cognates in similar actions thus constructively admitted that their contracts belonged in the second universe of "other" commodity contracts, clearly open to federal regulation. There was no need to address the issue of state regulatory overview, since all parties constructively conceded federal jurisdiction within the second universe of "other" contracts. It was only necessary to address their terms and conditions of sale to determine the true nature of these illegal off market futures contracts, thus making the findings of the federal courts with respect to them fully valid.

The Noble contracts, however, do not lie in the domain of "other" contracts, but belong to the first universe of forward delivery contracts, and so the teachings of Co Petro *et al* do not apply here. The Noble contracts were marketed to and disclosed to the general public as forward delivery contracts. The Noble instrument through its terms and conditions of sale was carefully structured to comply with all UCC requirements. The attorneys for the CFTC have lamely come forth with a blizzard of paperwork to cover for the lack of substance in their arguments. Only if they had addressed the threshold task of moving the Noble contracts from the first universe of forward delivery contracts into the second universe of "other" contracts could they properly have hoped to invoke Co Petro and its progeny.

A cash market bullion contract, such as that of the Noble Forward Delivery Program, which has deferred payment features of one sort or another pursuant to specific provisions of the UCC, and/or whose delivery situs may be at a greater or lesser distance from the location where the delivery transaction by transfer of title is consummated, also pursuant to specific provisions of the UCC, are mere variants of other state regulated cash market sales, so long as the terms of the UCC are not violated, and thus lie at a considerable distance from the threshold that divides forward delivery contracts as regulated by the several states under the UCC from futures contracts as regulated at the federal level.

In this proceeding the CFTC is like a band of robbers who wish to penetrate the inner chamber of a treasury, but who have spent all their time and effort in scheming the breach of the inner door, while neglecting to realize they have no plan to breach the outer door, which remains impregnable to them.

Indeed, the CFTC proceeds blindly with its complaints about Noble's delivery procedures, without foundation painting them as sham paperwork shuffling, questions the "independence" of delivery agents, speculates about "bright line definitions" etc., just as if the Noble contracts had already been brought over from the first universe of forward delivery contracts into the

second universe of "other" contracts. This is absurd, since the CFTC has never taken the first step to cite any specific provision of the UCC under which Noble fails of compliance.

There are no restrictions in the UCC as to who may engage in the commercial activities which it regulates. Many states have enacted into law, and many others are continuing to enact into law, a model commodity code promulgated by the North American Securities Administrators Association under which use by the general public of forward delivery contracts for speculative purposes is encouraged by specifying the standards which must be met by offerors of such contracts. The CFTC has failed to allege that the Noble contract fails of compliance with those Commodity Codes.

When an agent acts on behalf of his principal in compliance with the terms of the UCC it is just as if the principal had carried out the act himself. No evidence has been presented to indicate that the agency functions carried out in Noble's delivery transactions were not in compliance with the terms of the UCC.

THE COLORADO RESOLUTION

On April 7 and April 24, 1994, the Legislature of the State of Colorado adopted House Joint Resolution 94-1035, [Cf: APP 98] which

addresses the conflict of federal vs. state power and which declares refusal to bend to improper federal mandates.

Many other states have passed similar resolutions and still others are initiating similar action. The pleadings of the Defendants herein invoking the Tenth Amendment were peremptorily ignored in the lower courts. Perhaps the voice of a mere citizen-subject is heard with less intensity than that of a sovereign state. However, it is clear from the Colorado Resolution that the tenth amendment of the U.S. Constitution is to be taken seriously, and it thus becomes incumbent upon the entire federal apparatus to review its behavior patterns, taking care that it not encroach on rights and privileges specifically reserved to the several states.

BYPASS OF JURISDICTIONAL ISSUE

Owing to the atmosphere of hysteria which has characterized the judiciary as well as the general public in matters relating to sale of financial product over the telephone, the CFTC had incredible good fortune in the lower courts, where it found it unnecessary to answer to any discovery, to support its arguments, or to be faced by its victims. The CFTC's hopes of winning have depended entirely upon receiving uncritical obeisance to its imperial splendor in the courts, accompanied by uncritical acceptance of its empty

equivocations and rationalizations. These defendants have therefore received harsh treatment seemingly based exclusively on the nature of the business in which they engaged.

The CFTC should have been required to answer to the jurisdictional issues, to attempt to reach the threshold where the Noble Program could be extracted from the definition of a forward delivery contract under the UCC, and to explain the justice of a sanction visited alike upon both those not deemed sanctionable and upon those purportedly sanctionable.

The district court erred in that it failed to consider the pleadings, heard no arguments based thereon, failed to require the CFTC to produce any witness for testimony and cross examination, and issued hasty summary judgment in violation of Section 2 of the Act, the Tenth Amendment to the U.S. Constitution, and the provisions of the UCC.

The CFTC has continued to intone the same baseless assertions without specifically answering to the essential points raised by the Defendants, and studiously avoiding the central issues. Due to the indulgence of the lower courts, the CFTC has been excused from any real discovery.

The district court had not the legal authority to issue summary judgment in favor of the CFTC, nor to make a finding of "absence of genuine issue

as to any material fact," nor to render any judgment nor to issue any order (other than that of dismissal) in this proceeding, because the CFTC had no jurisdiction to proceed against these Defendants. Had the CFTC made any challenge of the status of the FDP as a state regulated vehicle, or had the CFTC made any challenge to Noble's compliance with UCC regulations, the lower court may have had jurisdiction to deliberate over such specific charges of failure to fit parameters laid down by the UCC. But the CFTC has utterly failed to allege any of the threshold issues, and has thus constructively conceded that the Noble Forward Delivery Contract remains within the first universe of forward delivery contracts.

The jurisdictional arguments were summarily shrugged off by the appeals court as "without merit". However, no findings of fact nor conclusions of law were given. Since the motions for summary judgment were never argued before the district court, summary judgment against the Defendants and in favor of the CFTC thus amounts to mere judgment on the pleadings. A summary assertion of "without merit" on appeal thus represents a distinct disservice, especially as the constitutional issues are so fundamental and have been so clearly set forth.

The opinion of the appeals court deals at length with the question of summary judgment viewed strictly as sanction. Arguments in favor of

such sanction have no basis. [Cf: Dissenting opinion of Judge Reinhardt.] Further, the adverse consequences of the sanction are not merely to the corporate defendants who are purportedly sanctionable, but to the personal defendants and the innocent Noble customers as well, none of whom had been deemed sanctionable.

REASONS FOR GRANTING THE WRIT

Summary judgment as a sanction was laid upon Noble/Moorgate but cannot without specific cause be laid upon the individual defendants. The purported "admission" of Noble/Moorgate does not constitute admission by any individual defendant, any customer, or other interested party. In this case, therefore, the sanction is unjust, as its consequences are not only to the parties purportedly at fault but also to many innocent parties against whom no sanctions are due since they did not engage in acts which the district court deemed sanctionable. Summary judgment as sanction was therefore never justified in this proceeding. The customers and the individual defendants cannot be sanctioned for the real or imagined poor deportment of the corporate defendants.

The interests of the customers of Noble Metals International Inc. are more profoundly affected in this action than are either plaintiff or defendants, in that as a group they have remitted more than

$12 million to Noble but will receive in return less than 3¢ on the dollar if Noble is liquidated.

The following is excerpted from the *Amicus Curiae* brief which was filed in the appeals court by the Noble Customers Association.

> "The rage and frustration of the 1800 innocent people who have been buffeted around by this action cannot be described. We are absolutely appalled that a thing like this could actually happen outside of Nazi Germany or Stalinist Russia. It is a shameful thing when a handful of government "servants" can trifle with the lives and fortunes of 1800 families just to gratify their own egos and advance their own careers. These people are supposed to be responsible for seeing that justice is done, not just winning cases.
>
> "We as taxpayers ironically pay the salaries of our tormentors at the CFTC, who use our money to support their games of personal ambition while they casually destroy what we as Noble customers have created with our own hard earned money. We are familiar with the arguments which the CFTC has filed, and can hardly believe that grown men could make such silly arguments with a straight face, or that any judge could fall for such hokum.

"Many people and organizations deal in metals trading. Why does the CFTC shut us down and leave the others in business? Perhaps we were breaking the law since we might all make some money. There is no sure thing in metal prices. People lose money every day. We understand that. But the CFTC took away any chance we had. Noble might have made some money for us, or at least we would get back a reasonable part of what we spent.

"But the receiver does not know how to create wealth the way Noble does, and he will give us a few pennies on each dollar, as they did in the Wynwood case. If that is what is meant by government protection, we ask this court, please do not protect us. At this rate we will be "protected" out of house and home."

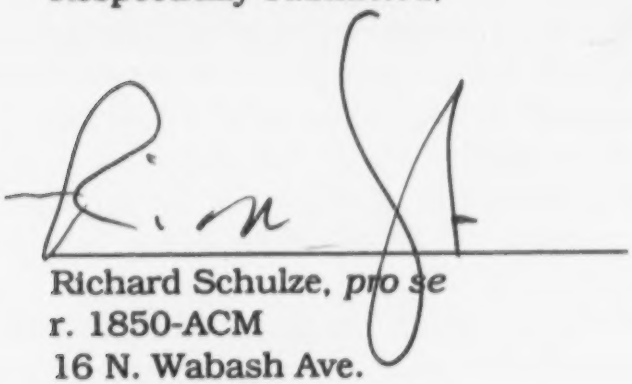
The customers had notified the district court of their desire to be heard but the said court in vigilante style entered summary judgment before the customers could present their *amicus*. The customers were thus left with the less viable alternative of presenting their case to the appeals court in lieu of the district court. The Noble Customers Association represents a large segment of the Noble customer base which remains unconvinced that Noble "swindled" them.

Further, the legitimate concerns of the customers aside, and notwithstanding summary judgment as a mere sanction, at very minimum the individual defendants were entitled to have their day in court.

CONCLUSION

"Deemed admitted" requires the ministrations of a deemster; the federal courts never had a right to play such a role. The many abuses suffered herein by the Defendants became possible only upon the unrightful attempt at usurpation of jurisdiction by federal forces. The partial recitation of those abuses herein is not intended to be exhaustive nor fully documented. Correction of this improper attempted exercise of federal power will render all of the said abuses moot, and will permit restoration of Noble's right to complete its deliveries to its customers. This appeal therefore does not seek adjudication as to those abuses which occurred after judgment was rendered in the district court, but rather focuses on a petition to rescind the wrongfully imposed jurisdiction which the lower courts have attempted to ratify. For the sake of the customers as well as the Defendants, this entire proceeding to date should be rendered null and void and without legal force or effect. For that reason, Petitioner respectfully asks that certiorari be granted herein.

Respectfully submitted,



Richard Schulze, *pro se*
r. 1850-ACM
16 N. Wabash Ave.
Chicago, Illinois 60602
(312) 263-4161
Fax (312) 263-5832

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-17285

COMMODITY FUTURES TRADING COMMISSION,
Plaintiff-Appellee
v.
RICHARD SCHULZE,
Defendant-Appellant.

Appeal
from the United States District Court
for the District of Nevada
Lloyd D. George, District Judge, Presiding

Argued and Submitted
February 14, 1995-San Francisco, California

Filed September 26. 1995

Before: Stephen Reinhardt, David R. Thompson
and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Thompson;
Partial Dissent by Judge Reinhardt

SUMMARY

Securities Litigation and Procedure
(Civil)/Commodities

The court of appeals affirmed a judgment of the district court in part. reversed in part, and remanded. The court held that a corporate commodity dealer's repeated failure to designate a representative to testify at a discovery deposition is sufficient to support the sanction of taking as true allegations of the Commodity Futures Trading Commission that the dealer violated the Commodity Exchange Act.

For an "administrative fee" appellants Noble Metals International Inc. and Moorgate Ltd. sold contracts for the purchase and sale of precious metals to the general public. Under Noble's and Moorgate's "Forward Delivery Program," customers bought the right and obligation to make or take delivery of specified quantities of metals on a designated future date at a pre-agreed price.

In practice, no metal changed hands; a third party would receive and deliver the metals through paper transactions. There was no expectation that customers would take actual delivery of the metals they bought.

Appellee Commodity Futures Trading

Commission (CFTC) filed an action under the Commodity Exchange Act (CEA) against Noble, Moorgate, and their principals, appellants Richard Schulze and Richard Portaro, Jr. CFTC sought injunctive relief, a freeze on the defendants' assets, an accounting, disgorgement, restitution, and appointment of a receiver. The complaint alleged that the defendants violated a 4(a) (off exchange sales) and 4(b) (fraud) of the CEA. Early in the litigation, the district court froze the defendants' assets and denied their attorneys' request for payment from them.

When CFTC served Noble and Moorgate with notices of deposition, only defense counsel appeared because Noble and Moorgate had not designated a deposition representative. At a rescheduled deposition, Schulze appeared for Noble and Moorgate, but invoked his Fifth Amendment right against self-incrimination.

On CFTC's motion to compel, a magistrate judge (MJ) determined that Noble and Moorgate had representatives available who would not assert their Fifth Amendment rights and that they had not attempted in good faith to locate one. The MJ imposed a $500 sanction and ordered the corporations to designate a representative who would not invoke the Fifth Amendment. The sanction was never paid; instead of designating a discovery representative, Noble and Moorgate submitted a list of persons who would not testify.

Not until CFTC moved for sanctions did Noble and Moorgate seek a protective order. They did not respond to the MJ's order that they explain how responding to discovery would place them in danger of self-incrimination.

Adopting the MJ's findings, the district court found that Noble and Moorgate willfully violated the court's orders by repeatedly failing to designate a discovery representative. As a sanction, the court ruled that all allegations in CFTC's complaint would be deemed true as against Noble and Moorgate.

On cross-motions for summary judgment, the district court found for CFTC based on the sanction order, issued a permanent injunction against Noble and Schulze, appointed a receiver over Noble's and Moorgate's frozen assets, and ordered the individual defendants to disgorge profits gained from the Forward Delivery Program contracts.

On appeal, Noble and Moorgate contended that the sanction was too harsh and an abuse of discretion. They also asserted that even if all the allegations of the complaint were true, they did not violate the CEA because the Forward Delivery Program did not involve the sale of futures contracts, but came within an exemption for "cash forward" contracts. Portaro contended that summary judgment should not have been granted

against him because there was a genuine issue of material fact whether scienter was established against him.

[1] Sanction orders taking the plaintiffs allegations as established and awarding judgment on that basis are the most severe penalty and are authorized only in extreme circumstances. [2] Noble and Moorgate made no showing of a good-faith attempt to designate an available representative. The list they submitted listed only six individuals who could not testify. when Moorgate alone had 148 employees. [3] Had Noble and Moorgate been unable to designate a representative, they could have sought a protective order. By not doing so and declining to make an appropriate designation, they engaged in a calculated course of conduct.

[4] The factors of risk of prejudice to the defendants and the availability of less drastic sanctions favored the district court's sanctions. [5] Noble and Moorgate's willful refusal to comply with the court's order severely prejudiced the government's ability to make its case. [6] The district court considered lesser sanctions: the MJ imposed a $500 sanction. A warning of a more harsh sanction for continued intransigence was not necessary. Noble and Moorgate could not have been surprised by the severity of the sanction because CFTC expressed its intention to seek more severe sanctions, and [7] the circumstances

were egregious. [8] Under the CEA, CFTC has jurisdiction over transactions involving contracts of sale of a commodity for future delivery traded or executed on a contract market. Futures contracts must be offered and sold on commission-designated boards of trade or they are illegal "off-exchange" contracts. [9] Excluded from CFTC jurisdiction are "cash forward contracts" i.e.. sale of a cash commodity for deferred shipment or delivery.

[10] The exclusion is unavailable when the commodities are sold for speculative purposes and the contracts are not predicated on the expectation that delivery of the actual commodity by the seller to the original buyer will occur in the future. [11] Among the many purchasers under the Forward Delivery Program, only a handful contemplated actual delivery.

[12] To take advantage of the exclusion, the delivery requirement cannot be satisfied by the device of a transfer of title. [13] Because there was no legitimate expectation that Noble's and Moorgate's customers would take actual delivery of the metal they bought, the Forward Delivery Program contracts were futures contracts subject to CFTC's jurisdiction.

[14] Section 4(a) does not require proof of scienter [15] when the defendant directly commits the violation. Even if Portaro's actions were mere

aiding and abetting, his actions as Moorgate's sales manager established his willful violation of the CEA. [16] His good-faith reliance on the opinion of counsel was irrelevant because scienter is not an element of the offense.

[17] With regard to the § 4(b) claim, scienter is an element. [18] There was a genuine issue of material fact whether Portaro acted with the requisite scienter to establish fraud. [19] Because there was, the district court's grant of summary judgment against him had to be reversed.

[20] A district court may within its discretion forbid or limit payment of attorneys' fees out of frozen assets. [21] The frozen assets were far short of the amount needed to compensate Noble's and Moorgate's customers. This was reason enough for the district court to deny the attorneys' fee application.

Circuit Judge Reinhardt dissented in part, expressing the view that the sanctions imposed on Noble and Moorgate for discovery violation were excessive and unlawful. He also wrote that the district court erred in failing to provide ade- quate warning to the defendants and failing to consider lesser alternative sanctions.

COUNSEL

Richard Schulze, pro se, Chicago, Illinois: Richard Portaro. Jr., pro se, Washington, D.C.: and John A. Field III. McLean. Virginia, for the appellants.

Jeffrey S. Holik, Assistant General Counsel, Washington, D.C., for the appellees.

OPINION

THOMPSON, Circuit Judge:

Noble Metals International, Inc.; Moorgate Ltd.; Richard Schulze, a principal of Moorgate and assistant secretary of Noble: and Richard Portaro, Jr., Moorgate's former sales manager, (collectively defendants) appeal the district court's grant of summary judgment in favor of the Commodity Futures Trading Commission (the CFTC or the Commission). The district court held that the defendants violated section 4(a) of the Commodity Exchange Act (the CEA or the Act), 7 U.S.C. §6(a) (1988), by offering and selling to the public illegal .'off-exchange" futures contracts. The district court also held the defendants committed fraud in connection with such sales, in violation of section 4b of the Act, 7 U.S.C. § 6b (1988).

The defendants contend the contracts which were sold to the public were not futures contracts. but rather cash forward contracts, which are excluded from the CFTC's jurisdiction. Noble and Moorgate further contend the district court erred in

prohibiting payment of attorney fees from their frozen assets.[1]

In addition to joining in Noble's and Moorgate's arguments, the individual defendants, Schulze and Portaro, offer additional arguments of their own. Schulze argues he is entitled to the defenses of estoppel. laches and statute of limita- tions. We have examined Schulze's individual arguments and conclude they are meritless.

Portaro argues the district court erred in granting summary judgment against him under section 4(a) of the Act. because he neither created nor maintained the
contracts, and relied in good faith on legal opinions that the contracts complied with the Act. He also argues the district court erred in granting summary judgment against him under section 4b of the Act, because genuine issues of material fact exist as to whether he had the necessary intent to defraud.

We affirm the district court's grant of summary judgment against all of the defendants on the section 4(a) count, and against all of the defendants except Portaro on the section 4b

---

[1]Another issue raised by Noble and Moorgate-whether the district court erred by failing to conduct a third hearing before granting the preliminary injunction-is mooted by our decision on the merits.

count. We also affirm the district court's denial of the request for payment of attorney fees from Noble's and Moorgate's frozen assets, and the district court's permanent injunction.

FACTS

Beginning in November 1989, Noble and Moorgate offered and sold contracts for the purchase and sale of precious metals to members of the general public under a program known as the "Forward Delivery Program." For a 15% "administrative fee," Forward Delivery Program customers obtained the right and the obligation to make or take delivery of specified quantities of precious metals at a price agreed upon at the time of formation of the Forward Delivery Program contact. After contacting a customer. Noble's and Moorgate's salespeople would send out a package of documents. including ..Confirmation of Purchase/Sale" and "Terms and Conditions of Purchase and Sale." These documents described the program in pertinent part:

> The administrative fee covers a two year period commencing on the date the order is placed. Customer at his election and upon providing notice to NOBLE may take or make delivery at anytime during said period. If Customer does not elect to take or make delivery within the initial two year period, Customer, upon payment of ... additional administrative fee[s] [may extend the delivery obligation by

three years]. .. . ALL CUSTOMERS ARE REQUIRED TO TAKE OR MAKE DELIVERY OF THE MERCHANDISE CONTRACTED. Delivery and transfer of title in return for payment are of the essence in the Extended Delivery Program. Prior to the delivery date, Customer must provide payment in full of the entire purchase price due to NOBLE or deliver acceptable hallmarked bullion as specified, as the case may be. This transaction cannot be liquidated through an offset.

Noble and Moorgate arranged for certain companies to act as "third-party agents" for the receipt and delivery of metals on behalf of their customers. Under this arrangement. a customer would receive legal title in the form of an invoice when he remitted the full purchase price. Instead of taking physical delivery, however, the customer would contract for the third party to receive, and then to sell. the metal. As a practical matter no actual metal would change hands; the third party would simply sell the metal back to Noble in a paper transaction. The third party would then receive a percentage fee, and the customer would receive the proceeds from the sale.

Noble and Moorgate continued to offer their Forward Delivery Program to customers until September 1991. In January 1992. the CFTC filed its complaint in this case. The CFTC sought injunctive and ancillary equitable relief, including

a temporary restraining order, preliminary and permanent injunctions, a freeze of the defendants' assets. an accounting disgorgement, restitution, and the appointment of a receiver.

On May 11, 1993, the district court issued an order adopting a report and recommendation of the magistrate judge that sanctions be imposed on Noble and Moorgate for failure to comply with certain discovery orders. The Commission had served Noble and Moorgate with notices of depositions pursuant to Federal Rule of Civil Procedure (Rule) 30(b)(6), sched- uling depositions for July 8, 1992. On the deposition date. only defense counsel appeared because Noble and Moorgate had failed to designate any deposition representative. Their counsel assured the CFTC that appropriate designations would be made. and the depositions were rescheduled. At the next scheduled deposition date. Schulze, a principal officer of Noble, appeared on behalf of Noble and Moorgate. He invoked his Fifth Amendment privilege against self- incrimination, and refused to answer any relevant questions.

In ruling on the Commission's subsequent motion to compel, the magistrate judge found Noble and Moorgate had rep- resentatives available to them who would not invoke their First Amendment privilege and that Noble and Moorgate had not made a good faith effort to locate a suitable representative. The magistrate judge then imposed

a $500 sanction, and ordered the corporations to "designate a person to represent them, pursuant to Fed. R. Civ. P. 30(b)(6), who will not invoke the fifth amendment privilege." (emphasis added).

The sanction was never paid. Rather than designate an appropriate representative. seek reconsideration of the order. or seek a protective order. Noble and Moorgate merely provided a list of persons who, for various reasons. would not testify. They then designated Schulze as their representative. knowing he would invoke the privilege against self-incrimination.

The Commission moved for sanctions in January 1993. In response. Noble and Moorgate for the first time sought a pro- tective order. After receiving the pleadings. the magistrate judge ordered the corporations to explain "how responding to the area of inquiry would place either Defendant in danger of self-incrimination." Neither Noble nor Moorgate responded.[2] Based on its adoption of the magistrate judge's findings. and pursuant to Rule 37(b)(2)(A). the district court ruled that all allegations of the complaint would be established as true against Noble and

---

[2]In their objections to the magistrate judge's report and recommendation. Noble and Moorgate contended they never received the minute order. The district court rejected this contention, noting that even if true, Noble and Moorgate could have included the necessary information in their objections.

Moorgate.

The court granted a temporary restraining order and later issued a preliminary injunction. Both sides moved for summary judgment. The district court granted summary judgment in favor of the CFTC. and denied the defendants' motion for summary judgment. The district court also issued a permanent injunction against Noble and Schulze, appointed a permanent receiver over Noble's and Moorgate's already-frozen assets. and ordered the individual defendants to disgorge profits made from the sale of the Forward Delivery Program contracts. This appeal by Noble, Moorgate, Portaro and Schulze followed.[3]

DISCUSSION

A. Summary Judgment

1. Against Noble and Moorgate

In granting summary judgment against Noble and Moorgate, the district court relied on the allegations of the complaint which it accepted as established. It did this pursuant to the sanction it had imposed for violation of the court's discovery order. On appeal, Noble and Moorgate contend the district court abused its discretion by imposing

---

[3]In addition to the parties' briefs. we have also carefully considered briefs submitted by amicus curiae, Noble Customers Association.

such a harsh sanction.

Rule 37(b)(2) provides in pertinent part:

(2) Sanctions by Court in Which Action is Pending.

> If a party or an officer, director or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order. . . .

Fed. R. Civ. P. 37(b)(2).

[1] Sanction orders taking the plaintiff's allegations as established and awarding judgment on that basis are "the most severe penalty," and are authorized only in "extreme circumstances." United States ex rel. Wiltec Guam, Inc. v.

Kahaluu Constr. Co., 857 F.2d 600, 603, 603 n.5 (9th Cir. 1988) (citing Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1338 (9th Cir. 1985)). To justify the imposition of such a harsh sanction, the district court must find that the vio- lations were "due to willfulness, bad faith, or fault of the party." Id. at 603 (quoting Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 589 (9th Cir. 1983)). However, "[i]n reviewing the sanction, the question is not whether we would have imposed a different sanction had we considered the matter originally, but whether the district court 'exceeded the limits of its discretion.'" Id. (quoting Halaco Eng'g Co. v. Costle, 843 F.2d 376, 379 (9th Cir. 1988)).

Both the magistrate judge and the district court specifically found that Noble and Moorgate willfully violated the court's orders by repeatedly failing to designate a representative who would testify at a discovery deposition. Noble and Moorgate argue there was no officer, director or managing agent available to testify, either because they were no longer employed by Noble and Moorgate, they would invoke the Fifth Amendment privilege, or they otherwise would not consent to testify.

[2] Noble and Moorgate, however, made no showing of any good faith attempt to designate an available representative. The list they submitted, purportedly in response to the magistrate judge's

November 9, 1992 order, lists only six individuals, all of whom could not testify for one reason or another. Significantly, Moorgate alone employed at least 148 people. In addition, by their own admission Noble and Moorgate never contacted some of the very "witnesses" they listed in their designation. For some of these witnesses, they merely stated summarily that the witnesses refused to testify, without explaining the basis for the witnesses' refusal.

[3] Had Noble and Moorgate truly been unable to designate a representative, they could have sought a protective order. See United States v. Kordel, 397 U.S. 1, 9 (1970) (appropriate remedy where a corporation finds it has no agents who can testify without invoking the privilege is a protective order under Rule 30(b)). By eschewing any application for such an order, and instead declining to make an appropriate designation of someone to testify, Noble and Moorgate engaged in a calculated course of conduct. See Adriana Int'l Corp. v. Theoren, 913 F.2d 1406, 1411 (9th Cir. 1990), cert. denied, 498 U.S. 1109(1991); cf: Fjelstad, 762 F.2d at 1343. This conduct was willful.

[4] In addition to willfulness, when a court order is violated, as in this case, a district court that decides to impose sanctions must consider the risk of prejudice to the defendants and the availability of less drastic sanctions. Adriana, 913

F.2d at 1412. Here, both factors favor the district court's sanction.

[5] Noble and Moorgate's willful refusal to comply with the court's order severely prejudiced the government's ability to make its case. See id. (finding that "the repeated failure of [the corporate party] to appear at scheduled depositions ... constitute[d] an interference with the rightful decision of the case"); see also Hyde & Drath v. Baker, 24 F.3d 1162, 1167 (9th Cir. 1994) (finding that failure of corporation to appear at depositions prejudiced opposing party).

[6] The district court also considered lesser sanctions. On November 10, 1992, the magistrate judge imposed a sanction of $500 on Noble and Moorgate. Although apparently the court never warned Noble and Moorgate that their continued intransigence would result in the harsh sanction eventually imposed, a warning was not necessary in this case. First, Noble and Moorgate could not have been surprised by the severity of the sanction. See Adriana, 913 F.2d at 1413 (no explicit warning necessary when harsh sanction of dismissal should not have surprised party who willfully violated court's order); Malone v. U.S. Postal Serv., 833 F.2d 128, 133 (9th Cir. 1987), cert. denied, 488 U.S. 819 (1988) (same). When seeking the original monetary sanction and order to compel, the CFTC explicitly expressed its intention to seek more severe sanctions, including

default judgment, if Noble and Moorgate failed to comply with the court's discovery order.

[7] Second, the circumstances surrounding the sanction were egregious. See id. at 132-33. Not only did Noble and Moorgate violate a court order and fail to pay the earlier $500 sanction. they did not seek a protective order even though they had six months to do so. The record also indicates this was not the first time these defendants engaged in dilatory tactics.

We conclude the district court did not abuse its discretion in imposing its Rule 37(b)(2) sanction ordering that the alle- gations of the complaint be taken as established for the purposes of the action.

Noble and Moorgate argue that even taking all of the allegations of the complaint as true, they did not violate sections 4(a) or 4b of the Act because, they contend, the Forward Delivery Program contracts they sold were not "futures contracts" regulated by the Act. We disagree.

[8] Under section 2(a)(l)(A) of the Act, the CFTC has exclusive jurisdiction over "accounts, agreements ... and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market." 7 U.S.C. § 2. The Act requires that these "futures contracts" be offered and sold on commission-

designated boards of trade, or they are deemed illegal "off-exchange" contracts. In re Bybee, 945 F.2d 309. 312 (9th Cir. 1991) (citing 7 U.S.C.§ 6(a)).

A futures contract enables an investor to hedge the risk that the price of the commodity will change between the date the contract is entered and the date delivery is due—without having to take physical delivery of the commodity. CFTC v. Co Petro Mktg. Group. Inc., 680 F.2d 573. 579-80 (9th Cir.1982). A futures contract provides that a specific amount of the commodity will be "delivered" to the buyer at a specified date (trade date) at an agreed-upon price. If the buyer does not want to take delivery of the commodity on the trade date, he enters an "off-setting transaction" to sell the same amount of the commodity. Id. The investor's profit or loss depends upon the difference between the amount the investor contracted to pay for the commodity and what he gets for it when he sells it.

[9] Excluded from the definition of futures contracts, and thus from CFTC jurisdiction, are "cash forward contracts," which are "any sale of any cash commodity for deferred shipment or delivery."[4] 7 U.S.C. §2. This "narrow" exclusion is predicated on both parties contemplating and

---

[4]The terms "futures contracts" and "cash forward contracts" are terms of art which do not appear in the Act.

intending future delivery of the actual commodity when immediate delivery would be commercially impracticable.[5] Co Petro, 680 F.2d at 578; see also In re Bybee, 945 F.2d at 313

[10] Noble contends the Forward Delivery Program contracts it sold were cash forward contracts, not futures contracts, and thus were exempt from CFTC jurisdiction. We disagree. The cash forward contract exclusion is "unavailable to contracts of sale for commodities which are sold merely for speculative purposes and which are not predicated upon the expectation that delivery of the actual commodity by the seller to the original contracting buyer will occur in the future." Co Petro, 680 F.2d at 579.

[11] It is undisputed that among the vast number of purchasers of metals under the Forward Delivery Program offered by Noble and Moorgate, only a handful contemplated actual delivery. Noble and Moorgate contend that they satisfied the "delivery" requirement nonetheless,

---

[5]Congress created the cash forward contract exclusion for farmers who (citing In re Stovall, [1977-1980 Transfer Binder], Comm. Fut. L. Rep.(CCH) ¶ 20,941, at 23,777-778).wanted to sell part of the next season's harvest at a set price to a grain elevator or miller. Co Petro, 680 F.2d at 577. In such a transaction, both parties are guaranteed a price, but delivery is delayed until the miller or elevator has the capacity to process the wheat. Id.

because the contracts required the buyer to "take or make delivery of the merchandise contracted." According to Noble and Moorgate,they satisfied this requirement by transferring, i.e., "delivering," title to the metals to the investor; the metals may have been held by the third-party depository, but the investor owned the metals, as reflected by his documents of title, and thus, he had taken delivery.

[12] We reject this argument. To take advantage of the cash forward contract exclusion under the Act, the delivery requirement cannot be satisfied by the simple device of a transfer of title. As we said in Co Petro, "a cash forward contract is one in which the parties contemplate physical transfer of the actual commodity." Co Petro, 680 F.2d at 578. If this were not so, the cash forward contract exception would quickly swallow the futures contract rule.

[13] "[S]elf-serving labels that the defendants choose to give their contracts should not deter the conclusion that their contracts, as a matter of law, [are futures contracts subject to the CEA]." American Metal Exch. Corp., 693 F. Supp. 188, 192 (D. N.J. 1988) (quoting CFTC v. Morgan, Harris, & Scott, Ltd., 484 F. Supp. 669, 675 (S.D.N.Y. 1979)). Here, there was no legitimate expectation that Noble's and Moorgate's customers would take actual delivery of the metal they bought. The Forward Delivery Program

contracts, therefore, were futures contracts subject to the Commission's jurisdiction, and, when Noble and Moorgate sold them in off-exchange transactions, they violated section 4(a) of the Act.

The district court did not err in granting summary judgment against Noble and Moorgate on this count. Nor did it err in granting summary judgment against them on the section 4b count. Taking the allegations of the complaint as established, Noble and Moorgate's sales of the Forward Delivery Program contracts were fraudulent within the meaning of section 4b.

2. Summary Judgement Against Schulze and Portaro

As we have previously stated, Schulze's individual arguments on appeal are meritless. We have also rejected Noble's and Moorgate's arguments, in which Schulze joins. We conclude, therefore, that the district court did not err in granting summary judgment against Schulze on the sections 4(a) and 4b counts.

Portaro, who was the former sales manager of Moorgate, argues summary judgment should not have been entered against him on the CFTC's allegations that he violated sections 4(a) and 4b of the Act, because there is at least a genuine issue of material fact whether scienter was established against him.

[14] That section 4(a) does not require proof of scienter has been settled, at least implicitly, by our court. See Co Petro, 680 F.2d at 582. A review of the statutory language confirms this conclusion. Section 4(a) provides:

> It shall be unlawful for any person to offer to enter into, to enter into, to execute, to confirm the execution of, or to conduct any office or business ... for the purpose of soliciting or accepting any order for, or otherwise dealing in, any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery ... unless—
>
> > (1) such transaction is conducted on or subject to the rules of a board of trade which has been designated by the Commission as a "contract market" for such commodity. . . .

7 U.S.C. § 6(a) (1988). Section 4(a) makes no mention of scienter. Compare 7 U.S.C. § 6b (1988).

Section 13c further supports this reading. Section 13c provides in pertinent part:

> (a) Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of

> any of the provisions of this chapter, or any of the rules, regulations, or orders issued pursuant to this chapter, or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions of this chapter or any of such rules, regulations, or orders may be held responsible for such violation as a principal.

7 U.S.C. § 13c(a) (1988).

[15] In contrast to the provisions for aider and abetter liability, section 13c does not require scienter when, as here, the defendant directly commits the violation. Furthermore, even if Portaro's actions merely constituted aiding and abetting, his willful violation of the Act is established indisputably by the record in this case. Portaro was the sales manager for Moorgate. He hired the salespeople who sold the Forward Delivery Program contracts, was responsible for their compliance and training, and supervised sales of the contracts to customers. He also offered and sold Forward Delivery Program contracts to members of the general public.

[16] We can accept as true Portaro's contention that he relied in good faith on the opinion of counsel that the Forward Delivery Program

contracts complied with the Act and he did not intend to do anything wrong. This is irrelevant in a section 4(a) case, because scienter is not an element of the offense.[6] It is enough that Portaro willfully did those things proscribed by the Act. See Lawrence v. CFTC, 759 F.2d 767, 773 (9th Cir. 1985) (finding willfulness established under the CEA "[i]f a person (1) intentionally does an act which is prohibited.—irrespective of evil motive or reliance on erroneous advice; or (2) acts with careless disregard of statutory requirements").

[17] With regard to the section 4b claim, however, scienter is an element.[7] The Commission

---

[6]Nonetheless, "good faith reliance on the advice of counsel is . . . a factor in determining the propriety of injunctive relief." Steadman, 967 F.2d 636, 648 (D.C. Cir. 1992); cf. also Aaron v. SEC, 446 U.S. 680, 701 (1980) (in applying provisions of the Securities Act of 1933 which do not require proof or scienter, "a district court may consider scienter or lack of it as one of the aggravating or mitigating factors to be taken into account in exercising its equitable discretion in deciding whether or nor to grant injunctive relief"). The district court took this factor into account by declining to issue a permanent injunction against Portaro.

[7]Section 4b provides in pertinent part:

It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in

must show Portaro intentionally violated the Act or acted with "careless disregard" of whether his actions violated the Act. Lawrence, 759 F.2d at 773; CFTC v. Savage, 611 F.2d 270, 283 (9th Cir. 1979)."Mere negligence, mistake, or inadvertence fails to meet Section 4b's scienter requirement." Wasnick v. Refco, Inc., 911 F.2d 345, 348 (9th Cir. 1990) (citing Drexel, Burnham Lambert, Inc. v. CFTC, 850 F.2d 742, 748 (D.C. Cir. 1988)).

[18] Here there is a genuine issue of material fact whether Portaro acted with the requisite scienter to establish fraud. The record is replete with references to his efforts to run a legitimate sales operation. For example, various sales-people attested that Portaro forbade them from misrepresenting any aspect of the Forward

---

the district court's connection with any order to make, or the making of, any contract of sale of any commodity for future delivery made, or to be made, for or on behalf of any other person is such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud such other person.

7 U.S.C. § 6b(A).

Delivery Program to their customers. Furthermore, there is no direct evidence that he intended to defraud anyone.

[19] Because there is a genuine dispute of material fact whether Portaro acted with the requisite scienter for a violation of section 4b of the Act, we reverse grant of summary judgment against him on that count.

B. The Asset Freeze

In the initial phases of the litiga-tion, the court froze the assets of each of the defendants, first as part of the temporary restraining order, and later as part of the preliminary injunction.[8] Shortly after the complaint was filed, counsel for Noble and Moorgate applied for payment of their attorney fees from the frozen assets. The district court denied this application. As a result, Noble and Moorgate were precluded from using the frozen assets to pay their attorney fees throughout the litigation.

[20] A district court may, within its discretion, forbid or limit payment of attorney fees out of frozen assets. See FSLIC v. Ferm. 909 F.2d 372,

---

[8]The court allowed the individual defendants to expend funds "for ordinary, reasonable, and necessary living expenses~." from their frozen assets.

Neither Schulze nor Portaro appeal the asset freeze.

375 (9th Cir.1990) (approving limitation on attorney fees); see also FTC v. World Wide Factors, Ltd., 882 F.2d 344. 347 (9th Cir. 1989) (observing that "[c]ourts regularly have frozen assets and denied attorney fees or limited the amount for attorney fees"); cf. CFTC v. Co Petro Mktg. Group, Inc.,700 F.2d 1279, 1284 (9th Cir. 1983) (Co Petro II) (requiring counsel to return fee received after defendants' assets were frozen for violating futures trading regulations).

[21] According to the record, the frozen assets fell far short of the amount needed to compensate Noble's and Moorgate's customers. This was reason enough in the circumstances of this case for the district court, in the exercise of its discretion, to deny the attorney fee application. See World Wide Factors, 882 F.2d at 348 (approving limitation on attorney fees "out of concern for preserving funds for ultimate distribution to defrauded customers") (citing FSLIC v. Dixon. 835 F.2d 554, 564-65 (5th Cir. 1987)); accord CFTC v. Morse, 762 F.2d 60, 63 (8th Cir. 1985). We do not, however, intimate that attorney fee applications may always be denied where the assets are insufficient to cover the claims.

Discretion must be exercised by the district court in light of the fact that wrongdoing is not yet proved when the application for attorney fees is made. Cf. Dixon, 835 F.2d at 565.

CONCLUSION

The district court's grant of summary judgment against all defendants for violating section 4(a) of the Act is affirmed. The district court's grant of summary judgment is also affirmed against all defendants except Portaro for violating section 4b of the Act. The district court's summary judgment against Portaro for violating section 4b of the Act is reversed. The district court's denial of the application for the payment of attorney fees from frozen assets and the district court's permanent injunction are affirmed.

AFFIRMED in part, REVERSED in part and REMANDED.

REINHARDT, Circuit Judge, dissenting in part:

I would hold that the sanctions imposed upon Noble and Moorgate for discovery violation were excessive and unlawful. In my opinion, ordering that the plaintiff's complaint be taken as established as a Rule 37(b)(2) sanction was an abuse of discretion. Moreover, I conclude that the district court erred in failing to provide adequate warning to the defendants and failing to consider lesser alternative sanctions. On a separate point, I believe that the order denying Noble and Moorgate the opportunity to use any of their assets for purposes of attorneys fees was erroneous.

In United States ex rel. Wiltec Guam, Inc. v. Kahaluu Construction Co., we identified "orders taking the plaintiff's allegations as established and awarding judgment to the plaintiff on that basis" and "dismissal of the plaintiff's action" as the most severe penalties that can be imposed against a defendant and plaintiff, respectively. United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co., 857 F.2d 600, 603 n.5 (9th Cir.1988). Entering a default judgment against a defendant as a discovery sanction precludes him from defending against the allegations raised against him. This court has refrained from imposing this very severe penalty in all but the most extreme cases. Id. at 603; Wanderer v. Johnston, 910 F.2d 652, 653 (9th Cir. 1990) (finding "[t]he severe sanction of default was justified by the defendants' repeated and inexcusable obstruction of every type of discovery attempted by the plaintiffs").

While I do not condone Noble and Moorgate's conduct during the course of pre-trial proceedings, the penalty should fit their transgression. Noble and Moorgate's conduct was not so extreme as to warrant the ultimate penalty.

Noble and Moorgate's conduct—failing to provide a representative who did not invoke the Fifth Amendment privilege— involved none of the extreme behavior for which we have affirmed default judgments against other defendants. See.

e.g. Wanderer v. Johnston, 910 F.2d 652. 653 (9th Cir. 1990) (affirming default judgment against defendants who "exhibited complete indifference to (the court's warnings, the orders of th[e] court and their discovery obligations, thereby thwarting plaintiffs' every attempt to secure basic, legitimate discovery"); Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 916 (9th Cir. 1987) (affirming default judgment entered against defendant for committing perjury during depositions and filing false pleadings with the court); Shearson Loeb Rhoades, Inc. v. Quinard, 751 F.2d 1102, 1103 (9th Cir. 1985) (affirming default judgment entered against defendant for "willful and deliberate disobedience of a discovery order, willful concealment of evidence, and attempted fabrication of false evidence").

"Even assuming that the conduct of [Noble and Moorgate] meets the extreme circumstances and willfulness require-ments," a review of the five Wanderer factors demonstrates that "the sanction imposed by the district court was not in the 'acceptable range'." Kahaluu, S57 F.2d at 603 (citing Malone v. United Stares Postal Service, 833 F.2d 128, 130 (9th Cir.1987)). We have reserved the default judgment sanction for defendants who made discovery of any type virtually impossible, particularly defendants who failed to produce documents. Relying upon our holdings in Hyde & Drath v. Baker, 24 F.3d 1162 (9th Cir. 1994). and Adriana v. Thoeren, 913 F.2d 1406 (9th Cir. 1990),

cert. denied, Lewis & Co. v. Theoren, 498 U.S. 1109 (1991), the majority suggests that the failure to appear for scheduled depositions is sufficient reason to find prejudice. However, we found prejudice in Hyde because

> the ... case resemble[d] Adriana International Corp.v. Thoeren, where "the repeated failure of [plaintiffs] to appear at scheduled depositions compounded by their continuing refusal to comply with court-ordered production of documents constitute[d] an interference with the rightful decision of the case."

Hyde, 24 F.3d at 1167 (citations omitted) (emphasis added). Noble and Moorgate did not engage in comparable conduct. Their failure to appear at depositions was not compounded by a failure to produce documents. "Delay alone has been held to be insufficient prejudice," whereas "[f]ailure to produce documents as ordered ... is considered sufficient prejudice." Adriana, 913 F.2d at 1412.

In addition, as we explained in Kahaluu, the district court abuses its discretion if it fails to consider less drastic alternative sanctions and to warn the defendants of the possible consequences, except in "exceptional" cases or cases involving "egregious circumstances." Kahaluu, 857 F.2d at 604. 605. We have said expressly that in most cases warranting the imposition of serious

sanctions, "the district court must consider less severe alternatives and discuss them if it elects to dismiss." Id. Because this is not the type of unusual case that justifies our abandoning our ordinary principles, the district court was obliged to give adequate warning to Noble and Moorgate and to consider lesser sanctions before precluding the defendants from opposing the plaintiff's claim.

"In some cases, the fact that the district court actually implemented alternative sanctions prior to dismissal may be enough to satisfy the 'considera-tion of alternatives' requirement." Id. This is not such a case. In Kahaluu we found a $300 sanction imposed against defendants for failing to comply with a document production request was insufficient to fulfill the district court obligation to consider alternatives. Id. Likewise, the $500 sanction imposed against Noble and Moorgate for failing to provide a representative who would not invoke Fifth amendment privilege at de-position does not satisfy that requirement.

> In short, the record indicates no consideration by the district court of the adequacy of lesser sanctions and no warning to the defendants that judgment might be awarded for [the Commission].

Kahaluu, 857 F.2d at 605. By precluding Noble and Moorgate from defending against the

Commission's claim, "the district court in effect deprived them of all of their rights as to [this] action." Id. "This harsh a penalty was not warranted." Id.

Attorney Fees

District courts do have discretion to regulate the payment of attorneys fees from assets that are frozen pending trial and to forbid the payment of some fees out of those assets. However, we have never previously held, as the majority appears to believe we have, that a flat prohibition against the payment of all attorneys fees, including those essential to provide a defense, is within a district court's discretion. To the contrary, in previous cases we have told the district courts to establish rules governing the use of frozen assets for attorneys fees and have described how and under what circumstances a district court may go about limiting access to frozen funds for payment of attorneys fees. See, e.g. FTC v. World Wide Factors, Ltd., 882 F.2d 344, 348 (9th Cir. 1989). Moreover, as one of the cases we have approved states specifi-cally, district courts should establish procedures that will permit the payment of reasonable attorneys fees. FSLIC v. Dixon. 835 F.2d 554, 565 (5th Cir. 1987).

The cases cited by the majority simply do not support its unprecedented holding. The district court in FSLIC v. Ferm, 909 F.2d 372, 375

(9th Cir. 1990), did not institute a flat prohibition against the payment of any attorneys fees out of frozen assets. Instead, that court only required that attorneys fees be monitored in camera to ensure their reasonableness. Likewise, in FTC v. World Wide Factors, Ltd., 882 F.2d 344, 347, 346 (9th Cir. 1989), we did not hold that a district court could forbid payment of all attorneys fees. Our holding in World Wide Factors was only that it is within a district court's discretion to place a limit on the hourly rate paid to the defendants' attorneys from frozen funds. Id. at 348. Finally, CFTC v. Co Petro Mktg. Group, Inc., 700 F.2d 1279, 1284 (9th Cir. 1983) (Co Petro II) has nothing to do with the district court's authority to freeze assets pending trial or the right of a party to use its assets for attorneys fees prior to or during the course of the trial. In Co Petro II, counsel received funds from the defendants after their clients had lost the trial on the merits and after they had been prohibited by a permanent injunction from using those funds for any purpose.[9] Likewise, the last case cited by the

---

[9]The majority's reliance on this case is understandable because our opinion appears, at times, to confuse the terms preliminary and permanent injunctions. In Co Petro (III), the law firm representing Co Petro appealed a district court order finding that it had violated a permanent injunction against the transfer of any of Co Petro's assets and ordering the return of $60.000 that the law firm had received the day after the district court issued its ruling on the merits against Co Petro. Co Petro (III) plainly and accurately describes the nature of the appeal and the issue

majority opinion deals with a prohibition of the payment of attorneys after the defendant lost on the merits. CFTC v. Marse, 762 F.2d 60, 61 (8th

---

before the court as follows:

> Appellant Loo, Merideth & McMillan appeals from a district court order declaring that appellant had violated a permanent injunction issued by the district court against any transfer of the assets of Co Petro Marketing Group, Inc. ("Co Petro"). The district court ordered appellant to return $60,000 it had received from Co Petro.
>
> Appellant contends (1) that the district court did not have jurisdiction to issue the order, (2) that the district court proceeding was automatically stayed under section 362 of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 362 (Supp. IV 1980), and (3) that receipt and deposit of the $60,000 by Appellant did not violate the permanent injunction.

Co Petro II, 700 F.2d at 1280 (emphasis added). The confusion stems from the fact that the hearing for the preliminary injunction was consolidated with the hearing on the merits. For this reason, apparently, our opinion sometimes refers to the permanent injunction against "transferring or dealing in any manner whatsoever with the assets of Co Petro" as a preliminary injunction. In any event, in Co Petro II, there was no question raised on appeal with respect to whether the district court had the discretion to issue an order prohibiting payment of any or all attorneys fees. The only issues raised were whether the district court was deprived of jurisdiction to proceed by virtue of the Bankruptcy Act, whether the proceedings were automatically stayed, and whether a violation of the injunction had occurred.

Cir. 1985) ("appeal from entry of a permanent injunction").

In World Wide Factors, cited by the majority, we did say in dictum:

> Courts regularly have frozen assets and denied attorney fees or limited the amount for attorney fees. See Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc., 700 F.2d1279 (9th Cir. 1983). Any doubt as to the constitutionality of freezing assets and precluding entirely their use for payment of attorney fees in circumstances even more extreme than this case have now been resolved by the Supreme Court's recent decision in United States v. Monsanto, U.S.,109 S.Ct. 2657 (1989) and Caplin & Drysdale, Chartered v. United States, U.S., 109 S.Ct. 2646 (1989).

World Wide Factors, 882 F.2d at 347 (parenthetical explanation omitted). While it is correct that "[a]ppellate court decisions... have consistently permitted district courts to limit or to review the amount payable to attorneys from frozen assets before a final judgment on the merits has been reached," Ferm, 909 F.2d at 374, district courts have only been permitted to forbid payment of all attorney fees in one particular class of cases. In support of our overbroad dictum in World Wide Factors, we properly cited the two

recent Supreme Court cases that do permit courts to totally forbid the payment of attorneys fees from disputed funds. Both cases involve criminal defendants and forfeiture statutes.

In Caplin & Drysdale, Chartered v. United States, 491 U.S.617 (1989) and United States v. Monsanto, 491 U.S. 600 (1989), the Supreme Court held that criminal defendants have no Sixth Amendment right to pay their attorneys fees with funds that are subject to being forfeited. These cases do not purport to determine the extent of the district court's discretion over frozen assets under other circumstances or in general. Nor is their rationale applicable to proceedings of the type before us. The Supreme Court cases set forth the reasons why criminal defendants do not have a constitutional right to pay their attorneys fees from forfeited or forfeitable funds. They do not explain why a defendant in a civil proceeding whose assets are not subject to forfeiture should be prohibited from using those assets to defend himself. The considerations affecting the two questions are obviously quite different.

This court has never before approved a total prohibition against the use of frozen assets for attorneys fees. Certainly, we have never done so as part of ancillary relief under section 6c of the Commodities Exchange Act, or in connection with any other civil case. The majority offers no explanation for why we should do so now. One of

the cases relied on by the majority cites the Fifth Circuit's decision in FSLIC v. Dixon. 835 F.2d 554, 565 (5th Cir. 1987). That case, however, far from forbidding the payment of attorneys fees out of frozen assets, held that "allowance must be made to permit each defendant to pay reasonable attorneys' fees if he is able to show that he cannot [otherwise] pay them." Granted, we might conclude that the burden is on the defendants to show they will only be able to hire an attorney if assets subject to the freeze order are released. Dixon. 835 F.2d 565. Nevertheless, at the very least, the district court in this case was obligated to assess whether or not the defendants needed to use the frozen assets to pay reasonable attorneys fees rather than categorically barring them from using any of their assets without even making an appropriate inquiry.

The purpose behind freezing a defendants' assets is "to ensure that such assets are not squandered by one party to the potential detriment of another," Ferm, 909 F.2d at 374, not to prevent defendants from mounting a defense at all.

> If, out of concern for preserving funds for ultimate distribution to defrauded customers, the district court wishes to limit the amount by which the frozen funds may be invaded for payment of attorney fees, it should set a maximum total sum which may be withdrawn or it

should establish the minimum size to which the otherwise frozen assets may be reduced based upon appropriate findings.

World Wide Factors, 882 F.2d at 348. The majority's concern that Noble and Moorgate's frozen assets fell short of the amount needed to compensate their customers is commendable. However, "this suit was brought to establish the defendants' wrongdoing; the court cannot assume the wrongdoing before judgment in order to remove the defendants' ability to defend themselves." FSLIC v. Dixon, 835 F.2d at 565. Some kind of allowance should have been made to permit Noble and Moorgate to pay reasonable attorney's fees associated with their defense.

In the
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-S-92-041-LDG (RLH)

COMMODITY FUTURES TRADING COMMISSION,
Plaintiff,

v.

NOBLE METALS INTERNATIONAL, INC.,
MOORGATE LTD.,
RICHARD SCHULZE,
RICHARD D. PORTARO, JR.,
DONALD N. SHEFLER and
ROBERT S. BARTLETT,
Defendants.

SUMMARY JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is rendered in favor of the Plaintiff and against the Defendants Noble Metals International, Inc., Moorgate Ltd., Richard Schulze, Richard D. Portaro, jr., Donald N. Shefler and Robert S. Bartlett pursuant to this csurt's Order granting summary judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants Noble Metals

International, Inc. and Richard Schulze and any or their affiliates, agents, servants, employees, successors, attorneys and assigns, other persons under their control, and all persons and entities in active concert or participation with them who receive actual notice of this Order and Judgment by personal service or otherwise, are permanently enjoined and restrained from directly or indirectly:

A. Offering to enter into, entering into, executing, confirming the execution of, or conducting any office or business anywhere in the United States, its territories or possessions, for the purpose of soliciting or otherwise dealing in, any transaction in, or in connection with, a contract for the purchase or sale of a commodityfor future delivery (other than a contract which is made on or subject to the rules of a board of trade, exchange, or market located outside the United States, its territories, or possessions) unless

1. such transaction is conducted on or subject to the rules of a board of trade which has been designated by the Conmission as a "contract market" for such commodity;

2. such contract is executed or consummated by or through a menber of such contract market; and

3. such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery; and from willfully aiding and abetting the foregoing acts, (Section 13(a) of the Act, 7 U.S.C. § 13c(a)),

and not acting in good faith or knowingly inducing, directly or indirectly, such violations (Section 13(b) of the Act, 7 U.S.C. § 13c(b)); all in violation of Section 4(a) of the Act, 7 U.S.C. § 6(a);

B. In or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, for or on behalf of any person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof cheating or defrauding or attempting to cheat or defraud such other person; and willfully aiding and abetting the foregoing acts (Section 13(a) of the Act, 7 U.s.c.§ 13c(a)), and not acting in good faith or knowingly inducing, directly or idirectly, such violations (Section 13(b) of the Act, 7 U.S.C. § 13c(b)), all in violation of Section 4b(A) of the Act, 7 U.S.C. § 6b(A).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that John H. Mowbray shall be appointed permanent equity receiver for Noble Metals Interational, Inc. and temporary equity receiver for Moorgate Ltd., and that he shall be authorized, empowered and directed to take all actions reasonable and necessary to perform the following tasks among others, with the costs of such receivership to be paid by the Defendants:

1. to take into his immediate passession and control all assets and property belonging to the corporate Defendants of whatever nature and description and wherever located, and to hold and administer such assets and property in order to ensure against their loss, damage or dissipation;

2. to remove existing management personnel from control and management of Noble Metals International, Inc. and to remove Defendant Schulze or any entity under his control from the position of controlling shareholder of Moorgate, Ltd.;

3. to cause an accounting to be made of the assets and liabilities of the corporate Defendants, and the amount of benefits received by the individual Defendants and Mooraate Ltd., including but not limited to, all funds received and paid out, all salaries, commissions, fees, loans, all commodity futures transactions, hedge transactions, all sales of Noble Forvard Delivery Program (FDP) contracts and confirmations, all deliveries or receipts of physical metals, and to cause a written report detailing the findings and conclusion of said accounting to be filed with this Court and served upon the parties to this action promptly upon completion of said accounting;

4. to dissolve and wind-up the business of Noble Metals International, Inc. and authorize the sale of Defendant Schulze's shares in Moorgate Ltd. to assure his disassociation from that corporation, the proceeds of such sale being subject to the restitution requirements of this

Judgment;

5. to establish procedures for the satisfaction of claims against the corporate Defendants, to notify claimants of such procedures, and to process and satisfy such claims in accordance with such procedures;

6. to hire such persons or entities whose services are reasonably necessary to perform the duties set forth herein;

7. to apply to this court, after notice to all parties, and a hearing if requested by any party, for such other power and authority reasonably necessary to perform the duties set forth herein; and

8. to report to this Court as to the performance and completion of these tasks.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the corporate Defendants shall surrender to the receiver appointed herein, all of their assets and property, of whatever nature and description and wherever located, whether held in the name of any of the Defendants or otherwise.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that within ninety (90) days of the entry of this Order the individual Defendants Schulze, Bartlett, Shefler and Portaro shall disgorge to the receiver appointed herein all benefits, including but not limited to, salaries, commissions, fees, draws, bonuses, loans, and payments in kind, obtained directly or indirectly as a result of the illegal acts and practices alleged in the Complaint, which will include at least

$801,214 form Defendant Schulze, at least $414,645 from Defendant Shefler, at least $552,631 from Defendant Portaro, and at least S434,834 from Defendant Bartlett.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all FDP contracts entered into by the Defendants with their customers shall be rescinded ab initio and that within 90 days of the date of entry of this Order the Defendants shall refund to their customers all money paid by the customers in connection with those contracts, with the Defendants being jointly and severally liable for said refunds.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants and any of their officers, directors, subsidiaries, parents, agents, servants, employees, successors, assigns, branch officers, attorneys, and any other persons in active concert or participation with them, who receive actual notice of this Order by personal service or otherwise, shall be prohibited from directly soliciting offering, or accepting any new FDP customers or any new deposits or payments of funds from existing FDP customers until further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that within ninety (90) days of the date of entry of this Order the Defendants shall make full restitution to all FDP customers of all funds received by the Defendants from FDP customers, with the Defendants being jointly and seerally liable for said restitution.

IT IS FURTHER ORDERED, ADJUDCED AND DECREED that within ten (10) days of said refund and restitution the Defendants shall prove to the satisfaction of the Plaintiff and the Court that such refund and restitution has been accomplished; proof of the accomplishnent of the refund and restitution to customers shall take the form of sworn statements, affidavits and/or depositions under oath at the election of the Plaintiff and shallinclude the provision of true copies of all appropriate documentation, including but not limited to, canceled checks, bank wire transfers, cashier's checks, money orders, sight drafts and/or any other evidence of repayment employed to effectuate said refund and restitution.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants make available all books and records for inspection and copying by the Plaintiff and shall cooperate fully with the plaintiff and the receiver in all matters related to the effectuation of this Order.

IT IS FINALLY ORDERED that the Court shall retain jurisdiction of these proceedings to ensure faithful performance by the Defendants of the terms and conditions set forth herein.

DATE: 28 JULY 1993
s/Lloyd D. George
Chief United States District Judge

In the
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-S-92-041-LDG (RLH)

COMMODITY FUTURES TRADING COMMISSION,
Plaintiff,

v.

NOBLE METALS INTERNATIONAL, INC.,
MOORGATE LTD.,
RICHARD SCHULZE,
RICHARD D. PORTARO, JR.,
DONALD N. SHEFLER and
ROBERT S. BARTLETT,
Defendants.

ORDER

This matter is before the court on the following motions:

Defendants Noble Metals International, Inc., Moorgate, Ltd. Robert Bartlett and Richard Schulze's Motion for Summary Judgment (#218), Opposition (#229);

Plaintiff's Motion for Summary Judgment (#223), Opposition by Noble, Moorgate, Bartlett and Schulze (#220), Reply (#226), Supplements by Defendant Schulze and Edward Bolle (#234) and (#235), Oppositions by Defendant Portaro (#236) and (#237), Replies (#238) and (#239); and

Defendant Schulze's Motion to Dismiss (241). Response time has not yet run.

In a May 11, 1993 Order (#216), the court adopted a Report & Recommendation (#213) by the Magistrate. The Order (#216) granted sanctions and ruled that, pursuant to Fed.R.Civ.Proc. 37(b)(2)(A), all facts and violations alleged by Plaintiff in its complaint were established as true against Noble and Moorgate. Defendants Noble, Moorgate, Bartlett and Schulze then moved for Summary Judgment (#218), followed soon thereafter by Plaintiff's own Motion for Summary Judgment (#223). On the basis of the findings in Order (#216), the court grants summary judgment against Defendants Noble and Moorgate. However, for the purpose of determining the liability of the individuals, the court will address the merits of the motions.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is only proper when the pleadings, discovery and affidavits show that there is "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." F.R.Civ. P. 56(c). There is no genuine issue of material fact when the record taken as a whole could not lead a rational trier of

fact to find for the non-moving party. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Once the moving party meets its initial burden, a non-moving party must "go beyond the pleadings, and, by its own affidavits or by the depositions, answers to interrogatories, and admissions on file, come forth with specific facts to show that a genuine issue of material fact exists." Hughes v. United States, 953 F.2d 531, 541-42 (9th Cir. 1992); Fed.R.Civ.Proc. 56(e). However, "[if a non-moving party relies on its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact." United States v 1 Parcel of Real Property, 904 F.2d 487, 492 n.3 (9th Cir. 1990).

The main dispute in this matter concerns a precious metals investment program offered to members of the general public by Noble under the name of the Forward Delivery Program (FDP). Plaintiff claims that sales under the FDP constituted off-exchange commodity futures contracts, a violation of section 4(a) of the Commodity Exchange Act (the Act), 7 U.S.C. §§ 1, et seq. (1988).[10] Plaintiff also alleges that fraudulent misrepresentations were made during

---

[10]As noted by Plaintiff, the Act was amended by the Futures Trading Practices Act of 1992, P.L. 102-546 (October 29, 1992), which resulted in the renumbering of several of the applicable sections. As Plaintiff did in its motion, newly renumbered citations will be identified parenthetically.

tha sale of the program constituting a violation of section 4b(a)(i) of the Act.

I. Violations of the 7 U.S.C. § 6(a)

The Act states, in pertinent part, that the Plaintiff Commission "shall have exclusive jurisdiction...with respect to accounts, agreements...and transactions involving contracts of sale of a commodity; for future delivery," 7 U.S.C. § 2(i), and that it "shall be unlawful for any person to offer to enter into, to enter into, to execute, to confirm the execution of, or to conduct any office or business . . . for the purpose of soliciting or accepting any order for, or service dealing in, any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery." 7 U.S.C. § 6(a).

Defendants counter that the sales of precious metal bullion under the FDP were in fact deferred delivery or "cash forward" contracts which are exempt from the jurisdiction of the CFTC. The Act specifically states that "[t]he term 'future delivery' does not include any sale of any cash commodity for deferred shipment or delivery." 7 U.S.C. § 1a(11). It is undisputed that the precious metals involved are cash commodities under the Act. Therefore, the pivotal issue for the court to determine is whether the sales of precious metal bullion under the FDP were exempted cash forward contracts.

In In re Bybee, 945 F.2d 309 (9th Cir. 1991), the Ninth Circuit set forth the following definition of a futures contract:

> "Commodity futures transactions involve standardized contracts for the purchase or sale of commodities which provide[] for future, as opposed to immediate, delivery, and which are directly or indirectly offered to the general public and generally are secured by earnest money, or 'margin.'"

Id. at 312, citing In re Stovall, [1977-80 Transfer Binder], Comm.Fut.L.Rep. (CCH) ¶20,941, at 23,777. As noted in Bybee, "[e]ach element need not be present for a transaction to be a futures contract." Id., citing Stovall, at 23,777. In CFTC v. Co Petro Marketing Group, Inc., 680 F.2d 573 (9th Cir. 1982), the Ninth Circuit held that since this is not a bright-line test or exhaustive list, "[t]he transaction must be viewed as a whole with a critical eye towards its underlying purpose." Id. at 581.

The undisputed facts show that the sales under the FDP were entered into pursuant to standardized contracts that provided for the purchase of a specific amount of precious metal at a designated price. The buyer paid a 15% "transaction fee" which held his metal until the expiration of a two-year period, at which time the contract became due for delivery. On that date,

the buyer was contractually required to pay the contract price for all of the metal purchased and Noble was required to deliver the metal. The undisputed facts also show that the vast majority of the buyers never contemplated actual physical delivery of the metal and instead sold their metal to a third-party agent through a separate offset agreement suggested by Defendants.

In Co Petro, based on the legislative history existing at that time, the court held that the cash forward exception "is unavailable to contracts of sale for commodities which are sold merely for speculative purposes and which are not predicated upon the expectation that delivery of the actual commodity by the seller to the original contracting buyer will occur in the future." Id. at 79. In Co-Petro, the court concentrated on the contractually provided ability of the buyer to offset the contracts for gasoline and the subjective and objective obligation of delivery. Id. at 578-80. The court found that the definition of a cash forward contract at that time required that the parties contemplate physical delivery of the actual commodity. Id. at 578.

The court also found that the ability to offset was an integral element of a futures contracts "since investors rarely take delivery against the contracts." Id. at 580. Because the gasoline contracts specifically provided for offset prior to delivery, and no actual delivery of the gasoline

was contemplated by either the buyer or the seller, the court found that the sales of gasoline were futures contracts. Id. at 581.

The court in Bybee then attempted to define a cash forward contract. According to the court, the exclusion was "'intended to cover only contracts for sale which are entered into with the expectation that delivery of the actual commodity will eventually occur through performance on the contracts.'" Bybee, 945 F.2d at 313, (quoting Stovall, at 23,777). The court noted that "'[a]lthough the desire to acquire or dispose of a physical commodity is the underlying motivation for entering such a contract, delivery may be deferred for purposes of convenience or necessity.'" Id., (quoting Stovall, at 23,778.

The court then revisited the ruling in Co Petro based on subsequent clarifying positions taken by the CFTC concerning the developing definition of cash forward contracts. The court began by stating that in Co Petro it had required a subjective intent as well as an objective showing of the delivery obligation in order to show a cash forward contract. Bybee, 945 F.2d at 313. However, the court then noted that because the contracts in Co Petro did not impose "the forced burden of delivery" on either party to the contract, the opinion in Co Petro did not discuss the nature of the legal obligations of delivery created by the contracts. Id. The court then moved on to

examine several interpretive releases by the CFTC which followed the Co Petro holding.

The most important of these releases is the Statutory Interpretation Concerning Forward Transactions, 55 Fed. Reg. 39188, 39189 (Sept. 25, 1990) (the 1990 Statutory Interpretation). The Bybee court noted that the 1990 Statutory Interpretation recognized that more modern, sophisticated forward contracts "may ultimately result in performance through the payment of cash as an alternative to actual physical transfer or delivery of the commodity." Bybee, 945 F.2d at 314, citing 1990 Statutory Interpretation, 55 Fed Reg. at 39191.

The Bybee court also noted that the 1990 Statutory Interpretation acknowledged that in today's economy commercial parties often agree to offset the contractual delivery obligations and that such separately negotiated offset agreements would not preclude application of the exception. Id. at 314, citing 1990 Statutory Interpretation, 55 Fed Reg. at 39192. The conclusion of the 1990 Statutory interpretation was that the regulatory scheme for futures trading "should not apply to private commercial merchandising transactions which create enforceable obligations to deliver but in which delivery is deferred for reasons of commercial convenience and necessity. 55 Fed. Reg. at 39190.

Thus, the mere fact that separate offset agreements are entered into will not necessarily preclude application of the cash forward exclusion. However, the 1990 Statutory Interpretation specifically states that the exclusion under these circumstances would still be in force only for private commercial merchandising transactions. The court noted that the broader definition of forward contracts in the 1990 Statutory Interpretation applies only to "'transactions entered into for commercial purposes related to the business of a producer, processor, fabricator, refiner or merchandiser, who may wish to purchase or sell a commodity for deferred shipment or delivery in connection with the conduct of its business.'" Id. at 314 n.5, (quoting 1990 Statutory Interpretation, 55 Fed. Reg. at 39191. Further, the court noted that the 1990 Statutory Interpretation stressed the parties' "'capacity to make or take delivery.'" Id.

Based on the analysis above, the court in Bybee found that the contracts entered in to between Bybee and A-Mark were excluded cash forward contracts. Id. at 315. Thus, the court must have found that Bybee and A-Mark entered into their transactions for commercial purposes related to the business of producing, processing, fabricating, refining or merchandising the metals.

Here, the facts show that the vast majority of the individuals purchasing the metals under the

FDP were members of the general public who did so to speculate on the prices of the metals. Thus, the individuals purchasing metals under the FDP were not purchasing the commodity in connection with the conduct of a business. The court in Bybee noted that public involvement is an important factor to consider in deciding whether a particular transaction constitutes a cash forward contract or an illegal off-exchange futures contract. Bybee, 945 F.2d at 313. Further, Defendants do not sufficiently dispute the allegations by plaintiff that Noble never had more than 13,000 to 14,000 ounces of silver. Thus, it seems clear that Defendants never had the capacity to make delivery of all of the metal it sold under the FDP.

Taking all of the factors into consideration, with an eye towards the underlying purpose of the contract, it is clear to the court that the contracts sold under the FDP were not excluded cash forward contracts. The parties were not commercial merchandisers and there was no commercial convenience or necessity contemplated by the deferred delivery. The underlying purpose of the deferred delivery nature of the FDP was to provide members of the general public with the opportunity to speculate on fluctuations in precious metal prices without having to take actual delivery of the metal itself. The suggestion by Noble to its customers of the offset agreements with the third party further

suggests that the FDP involved futures contracts instead of a cash forward contracts.

The main issue set forth by the parties concerning the nature of the contracts is a legal issue. The court has determined as a matter of law that the contracts offered by Noble under the FDP were not cash forward contracts excluded from the jurisdiction of the Act. As such, the Evidence shows that they were illegal off-exchange futures contracts. Therefore, summary judgment as against Defendants Noble, Moorgate, Bartlett and Schulze is proper.

Defendants Portaro and Shefler have submitted oppositions and declarations suggesting that they should not be held liable under the Act because they were under the impression that the FDP was a legal program. In other words, they argue that they should not be held liable for any violations of section 4(a) of the Act because they did not possess an intent to deal in off-exchange commodity futures.

Section 6(a) states that it is a violation of the act to offer or sell off-market futures contracts. In reading the statute, the court does not find a scienter requirement. Thus, based on the clear language of the statute, the court finds that knowledge of the illegality of the FDP is not necessary to show liability for offering it for sale and selling it. Neither Defendant Portaro nor

Defendant Shefler nor Defendant Bartlett deny offering the FDP for sale. Therefore, summary judgment against these defendants is proper on this charge.

II. Violations of 7 U.S.C. § 6b(a)(i)

The Act also makes it unlawful to defraud persons in connection with the sale of any commodity future contract. 7 U.S.C. § 6b(a)(i). Plaintiff has presented deposition testimony by numerous customers of the FDP alleging that Defendants Bartlett, Shefler and other salespersons of the FDP and Moorgate engaged in one or more of the following: (1) used high pressure sales tactics; (2) made guarantees of increases in bullion value; (3) misrepresented the risk of investing in the FDP; (4) misrepresented the nature of the 15% administrative fee by calling it a downpayment; and (5) misrepresented the supply of metal. There was also evidence presented that Defendant Portaro aided and abetted the allegedly fraudulent activities of the salespersons at Moorgate due to his supervisory position and his oversight and approval of the above mentioned fraudulent sales tactics.

Defendants Noble, Moorgate, Bartlett and Schulze set forth no argument or facts to refute the evidence stated above other than to state that the allegations of fraud are without merit. Instead, they choose to rely solely on the

argument that the FDP contracts were deferred delivery or cash forward contracts. This is insufficient to withstand summary judgment on the claim for fraud under section 6b(a)(i).

Further, section 4 of the Act states that the act of any agent or other person acting for the corporation or partnership within the scope of his employment shall be deemed the act of the partnership or corporation. 7 U.S.C. § 4. Given the undisputed deposition testimony of material misrepresentations made to clients purchasing the FDP from Noble and Moorgate, liability for those representations is automatically ascribed to Noble and Moorgate under section 4.

As for Defendant Shefler, there is ample evidence presented by Plaintiff of misrepresentations made by him during his efforts to sell the FDP. Defendant Shefler states in his affidavit that he did not use high pressure tactics and that some other salesman must have used his name. Taken in the light most favorable to him, it is not clear that a reasonable trier of fact could not find for Defendant Shefler. Given the fact that these transactions were all consummated over the phone, the question or identity is one for the trier of fact. Accordingly, summary judgment against Shefler on the violation of section 6b(a)(i) is not proper.

Defendant Portaro does not address the allegations that he made fraudulent misrepresentations or monitored sales calls and approved sales by Defendant Shefler or other salesmen which he knew or should have known contained fraudulent misrepresentations. Instead, he concentrates his opposition on the argument that he lacked the intent to engage in an illegal program. As noted above, this argument is unavailing. Thus, he has failed to provide any facts to refute the evidence set forth by Plaintiffs that he committed fraud. Therefore, summary judgment against him is also proper.

III. Relief

Plaintiff seeks injunctive relief, disgorgement, rescission and restitution. Plaintiff also requests that Noble and Moorgate be placed in permanent receivership, with the receiver to perform the following tasks: (1) seize possession and control over all assets and property belonging to the corporate Defendants; (2) remove existing management personnel from the corporate Defendants; (3) cause an accounting to be made of the assets and liabilities of the corporate Defendants; (4) dissolve and wind-up the business operations of the corporate Defendants; (5) establish procedure for the satisfaction of claims against the corporate Defendants; (6) hire the persons or entities necessary to perform the duties set forth; (7) apply to the court for such other

powers as are necessary to perform the duties described; and (8) report to the court concerning the performance of these duties.

A. Injunctive Relief

Injunctive relief is available under section 13a-1 of the Act. Section 13a-1 states that injunctive relief is proper where it appears that any person "has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this chapter. . . ." 7 U.S.C. § 13a-1(a).

Plaintiff argues that, although the Defendants ceased sales of the FDP program over a year ago, injunctive relief is proper because there is a reasonable likelihood that future violations will occur. See CFTC v. American Metal Exchange Corp., 693 F.Supp. 168, 195 (D.N.J. 1988). Plaintiff also argues that the evidence of prior involvement by Defendant Schulze in previous illegal scams merits injunctive relief.

The court agrees that the evidence shows that, based on prior conduct and the nature of the involvement in the instant case, there is a reasonable likelihood that Defendants Noble and Schulze might commit future violations of the Act. Although Defendant Schulze denies some of the alleged prior conduct, the court finds that there is sufficient evidence that Defendant

Schulze has previously attempted to flaunt federal regulations and defraud the public. There is also sufficient evidence that Defendant Schulze was the controlling force behind Noble. Accordingly, permanent injunctive relief as against these Defendants is proper.

As for Moorgate and the individual Defendants, the court does not find that there is sufficient evidence that they will engage in future violations absent an injunction. Although Moorgate and its salespeople were willing participants in the marketing of the FDP, there is no evidence that they previously engaged in activities or conduct which violated the Act. Therefore, it is not clear to the court that there is a reasonable risk that they will engage in similar violative conduct in the future.

B. Ancillary Relief

1. Disgorgement

In Co Petro, the court approved the use of disgorgement under the Act on the basis that the court has inherent equitable powers to afford complete relief. Co Petro, 680 F.2d at 584. The court found that disgorgement was proper because "'[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains.'" Id. at 583, (quoting Porter v. Warner Holding Co., 328 F.2d 395, 400 (1946) (footnote omitted).

In this matter, it appears from the deposition testimony that all the Defendants profited handsomely from the sale of the FDP. As the court has found that the FDP was an illegal program, and that fraudulent measures were taken to sell it to the general public, the court finds that disgorgement will serve to help assure future compliance with the requirements of the Act by all Defendants. Also, the court agrees with the finding in Co Petro that allowing a violator to retain his ill-gotten gains would frustrate the purposes of the Act. Id. at 584.

2. Rescission and Restitution

The Ninth Circuit has not ruled on whether rescission is a proper remedy under the Act. See Bybee, 945 F.2d at 311 n.l. However, in Co-Petro, the court noted that a district court has broad equitable powers to afford complete relief. Co Petro, 680 F.2d at 584. In this matter, the natura of the FDP and the techniques employed to market it resulted in the loss of millions of dollars to members of the general public.

The court finds that rescission of the fraudulent and illegal contracts and restitution of the consideration paid for these contracts is necessary to assure that the ill-gotten gains are not retained by the Defendants and that the defrauded purchasers are restored to the position they were in prior to entering into contracts under the FDP.

3. Receivership and Accounting

The appointment of a receiver is also proper equitable relief under certain circumstances. In this matter, the court finds that Noble was created by Defendant Schulze for the express purpose of avoiding federal regulation and defrauding the public. As such, a receiver should be appointed to take over corporate control of any and all of Noble's assets. Further, the receiver should also dissolve and wind-up the corporation.

In the case of Moorgate, it appears from the record that Noble's FDP program was only one of the programs sold by Moorgate and that, although Defendant Schulze acquired a controlling interest in the shares of Moorgate in 1989, Moorgate has other shareholders who have no affiliation with Schulze or Noble. Accordingly, a receiver should be appointed on a temporary basis to conduct an accounting to recover any and all assets held by Moorgate which are attributable to its sale of the FDP program. At such time as the profits and monies attributable to Moorgate's association with Noble and the FDP program are identified and recovered, the receiver will relinquish corporate control.

IV. Motion to Dismiss

Defendant Schulze has submitted a Motion to Dismiss (#241) the complaint in proper person.

Based on the analysis above, the court would deny this motion. Further, Local Rule 120-7 states that "[w]henever a party has appeared by attorney he cannot while so represented appear or act on his own behalf in the case." Defendant Schulze has appeared through his attorney, John A. Field III, Esq., throughout these proceedings. The court has received no notice of substitution or of dismissal by Defendant Schulze. Therefore, the Motion to Dismiss (#241) is improper under Local Rule 120-7 and will be stricken.

Accordingly, good cause appearing,

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment (#223) is granted pursuant to the instructions in this order.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment (#223) is denied as to the claim for violation of section 6b(a)(i) for fraud against Defendant Shefler.

IT IS FURTHER ORDERED that Defendants' Motion for Summary judgment (#218) is denied.

IT IS FURTHER ORDERED that Defendant Schulze's Motion to Dismiss (#241) will be stricken.

DATE: 28 JULY 1993
/s/ Lloyd D. George
LLOYD D. GEORGE
Chief United States District Judge

In the
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-S-92-041-LDG (LRL)

COMMODITY FUTURES TRADING COMMISSION,
Plaintiff,

v.

NOBLE METALS INTERNATIONAL, INC.,
MOORGATE LTD.,
RICHARD SCHULZE,
RICHARD D. PORTARO, JR.,
DONALD N. SHEFLER and
ROBERT S. BARTLETT,
Defendants.

PRELIMINARY INJUNCTION

This matter is before the court on the plaintiff's motion for a preliminary injunction and ancillary equitable relief (#3).

1. Facts

The plaintiff in this action, the Commodity Futures Trading Commission ("CFTC" or "Commission"), is an independent regulatory

agency of the United States charged with the administration and enforcement of the provisions of the Commodity Exchange Act, 7 U.S.C. §§ 1 et seq. The defendants are corporate and individual parties whom the CFTC alleges 1) have been offering and selling off-exchange futures contracts to the public and; 2) have been committing fraud in connection with those contracts, all in violation of the Commodity Exchange Act, 7 U.S.C. §§ 6(1) & 6 (b).

In sum, the CFTC has alleged the following: 1) The Commodity Exchange Act requires that all commodity futures contracts be offered and sold on or subject to the rules of a board of trade which has been designated by the Commission as a contract market and that those contracts be executed by or through a member of such contract market; 2) between 1989 and 1991, defendant Noble Metals, through its sales agent Moorgate, Ltd., and, among others, Moorgate salesman Donald Shefler and sales manager Richard Portaro, allegedly offered and sold to the general public certain "Forward Delivery Program" contracts which were, in essence, illegal off-exchange commodities futures contracts; 3) the victims of this scheme were allegedly solicited by the defendants by telephone calls which involved high-pressure sales tactics including false, deceptive and misleading statements, and 4) Noble continues to "service" these contracts, further defrauding its customers out of substantial sums of money.

A hearing was held in this matter on January 21, 1992. At that hearing, defendants Noble, Moorgate, Schulze and Barlett joined in opposition to the plaintiff's motion. Defendants Richard Portaro, Jr. and Donald Shefler also appeared at that hearing and personally opposed the relief requested by the CFTC, specifically the freezing of their personal assets, but offered no substantive opposition to this action. The court was unable to complete the hearing, due to other judicial commitments, but the relief requested by the CFTC was granted by the court for a period of ten days.

On February 3, 1992, a second hearing was held at which the defendants renewed their opposition to the plaintiff's motion. At that time, the court heard testimony from defendant Richard Schulze, who appears to be the mastermind behind the Noble program. Mr.Schulze described the Noble Forward Delivery Program and testified that it was designed specifically to avoid CFTC jurisdiction.

The CFTC, in response to arguments made by defense counsel and the testimony of Mr. Schulze, reiterated its position that the Forward Delivery Program contracts are commodities futures contracts subject to Commission jurisdiction. The CFTC further argued that the defendants' assets should not be released to pay attorneys' fees, especially since the receiver has only been

able to locate approximately $250,000 in assets, although the defendants stand accused of defrauding customers out of approximately $10,000,000. The CFTC indicated at that hearing its intention to enter into a stipulation with defendants Portaro and Shefler with respect to the freeze of their personal assets, allowing those defendants necessary personal and business expenses. Having considered the evidence presented in the papers and at that hearing, the court issued a temporary restraining order on behalf of the plaintiffs. A written form of that order was issued on February 7, 1992.

On February 18, 1992, a telephonic conference call was held in this matter, in relation to the possible extension of the February 7 temporary restraining order. At that time, counsel for defendants Moorgate, Noble and Schulze and counsel for defendant Portaro offered to provide additional testimonial evidence, in the event another hearing was convened in the matter. However, the court finds that the evidence offered by these defendants would not materially effect the determination by the court of the issues in this case relative to the issuance of a preliminary injunction. The court has substantial documentary and testimonial evidence before it from which it can make the necessary determinations.

2. Law

The court, having reviewed the pleadings and considered the evidence and arguments presented at the hearings held in this matter, finds that the CFTC is likely to prevail on its claim that the defendants have been engaged in selling fraudulent off-exchange commodities futures contract.s Therefore, a preliminary injunction on behalf of the plaintiff is in order. The grounds for this ruling are substantially the same as those underlying the court's issuance of a temporary restraining order.

The issue that seems to most suggest this result involves the "delivery" component of the Noble Metals Forward Delivery Program. A commodities futures contract, by definition, is entered into primarily for the purpose of assuming or shifting the risk of change in value of commodities, rather than for transferring ownership of the actual commodities, In Re Stovall, Com. Fut. L. Rep. (CCH) 20,941 (Dec. 6, 1979). The CFTC argues that legitimate "delivery " of metal is never intended under the Forward Delivery Program contracts. The defendants claim that the Noble contracts contemplate actual delivery of metal.

The Commission has submitted numerous affidavits which suggest that Noble customers entered into Forward Delivery Contracts because

those contracts were represented as opportunities to speculate in precious metals. The affidavits submitted by the Commission further indicate that these Noble customers, on the strength of representations made by Noble and Moorgate salesmen, never expected any "physical delivery" of metal under their contracts.

Noble agrees that no physical delivery occurs, or is even intended. Instead, Noble insists, that, upon a customer's request[11], a paper transfer of title to the purchased metals is effected, once the customer has paid the full purchase price under the contract, thus fulfilling the "delivery" requirement of the contract and removing the contracts from CFTC jurisdiction.[12]

The evidence before the court indicates that, in actual practice, payment of the full purchase price can be avoided under the Noble program if a "third party" takes delivery for the customer.

---

[11]Noble does admit that, because the price of precious metals has dropped significantly since 1989, few, if any, Noble customers have requested delivery (obviously because they would be "buying" at a significant loss.

[12]In this regard, Noble indicates that over 200,000 ounces of silver have been "delivered' in this fashion in their program. No documentation of these deliveries has been provided. The CFTC suggests that a very small amount of metal held in a Rhode Island bank is used as the nominal subject of all of these paper transfers.

Noble, as a standard procedure, provides its customers with the names of "third party" agents who are allegedly willing to "take delivery" of the customers' metal. The third party generally charges the customer the difference between the market price of the metal and the amount of money required to extinguish the customer's obligations under the contract (virtually all of Noble's customers are in a loss position, due to recent decline in the price of precious metals).

The evidence before the court further suggests that the nominally independent "third parties" participating in this scheme are not independent at all, but rather are agents of defendant Richard Schulze, acting on his request and instruction. In essence, the third parties charge the Noble customers a fee to extinguish their obligations under their Noble contracts, or at least to relieve them of their immediate obligation to purchase and take delivery of the metal.[13] The amount of the fee depends upon how much the customer actually "lost" due to the decline in the price of the metal he supposedly purchased. The court has

---

[13]There is some indication in the record that the third parties purport to "finance" the metal at the time delivery under the Forward Delivery Program contract is due, subsequently charging the Noble customers finance charges.

serious doubt about the legitimacy of the Forward Delivery Program contracts. The Ninth Circuit has observed,

> In determining whether a particular contract is a contract of sale of a commodity for future delivery over which the Commission has regulatory jurisdiction by virtue of 7 U.S.C. § 2 (1976), no bright-line definition or list of characterizing elements is determinative. The transaction must be viewed as a whole with a critical eye toward its underlying purpose. The contracts [in that case] represent speculative ventures in commodity futures which were marketed to those for whom delivery was not an expectation. Addressing these circumstances in the light of the legislative history of the Act, we conclude that [the defendants'] contracts are "contracts of sale of a commodity for future delivery." 7 U.S.C. § 2 (1976).

Commodity Fut. Trad. Com'n v. Co Petro Marketing, 680 F. 2d 573, 581 (9th Cir. 1982). The Forward Delivery Program, when viewed as a whole with a critical eye toward its underlying purpose, appears to be merely a ruse employed by the defendants in order to avoid operating within the bounds of the law.

First, there is a serious question in the court's mind whether sufficient quantities of metal actually exist and are under Noble's control to support the "delivery" obligations it has entered into with its customers. Because those obligations may be extinguished through a paper transfer, it is possible that no metal (or an insignificant amount of metal) is behind the nominal "title" that is transferred, again and again, to each of Noble's customers who request delivery. And, again, the "delivery" requirement itself of the Forward Delivery Program contracts appears to be a mere ploy to avoid Commission jurisdiction. Indeed, the scheme as a whole seems to be nothing more than an ill-intended plan to avoid government regulation and defraud the public. Therefore, a preliminary injunction on behalf of the plaintiffs will be granted and this case will be set for trial on a priority basis.

Accordingly, for the reasons above stated,

IT IS ORDERED that plaintiff's motion for a preliminary injunction and ancillary equitable relief (#30 is granted;

IT IS FURTHER ORDERED that the defendants, and any of their affiliates, agents, servants, employees, successors, attorneys and assigns, other persons or entities under their control, and all persons and entities in active concert or participation with them who receive

actual notice of this Order by personal service or otherwise, are enjoined and restrained from directly or indirectly:

A. Offering to enter into, entering into, executing, confirming the execution of, or conducting any office or business anywhere in the United States, its territories or possessions, for the purpose of soliciting or accepting any order for, or otherwise dealing in, any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery (other than a contract which is made on or subject to the rules of a board of trade, exchange, or market located outside the United States, its territories, or possession) unless

1. such transaction is conducted on or subject to the rules of a board of trade which has been designated by the Commission as a "contract market" for such commodity;

2. such contract is executed or consummated by or through a member of such contract market; and

3. such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery; and willfully aiding and abetting the foregoing acts.

B. In or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transactio in interstate commerce in such commodity or the products or byproducts thereof, or (b) determining the price bases of any transaction in interstate commerce in such commodity, or (c) delivering such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof--cheating or defrauding or attempting to cheat or defraud such other person; and willfully aiding and abetting the foregoing acts;

IT IS FURTHER ORDERED that the assets of the defendants remain frozen and that the defendants and any of their affiliates, agents, servants, employees, successors, attorneys, assigns, or other persons or entities under their control, all persons and entities in active concert or participation with them, and all banks and financial institutions holding money on their behalf, who receive actual notice of this order by personal service or otherwise, shall be prohibited and restrained from directly or indirectly:

A. Withdrawing, transferring, removing, dissipating, disposing of or otherwise secreting any funds, assets, or other property, wherever situated, including but not limited to any metals,

currencies, coins, commodity futures contracts (except for the liquidation of open positions by a registered futures commission merchants, funds or securities held on account or in safety deposit boxes at any financial institution or with any futures commission merchant, of any of the defendants, whether held in the name of the defendants or otherwise, or within the custody, possession or control of any of the defendants herein; and

B. Destroying, altering, disposing of, mutilating or concealing, in any manner, any of the books, records, documents, or writings of any kind, or electronically stored data, or tape recordings, or other property of the defendants, whether maintained in the name of defendants or otherwise;

IT IS FURTHER ORDERED that representatives of the plaintiff continue to be allowed to inspect the books, records, electronically stored data, tape recordings, computer discs and other documents of defendants and their agents, wherever they may be situated and whether they are in the possession of the defendants or others, and to copy said documents, data and records either on or off the premises wherever they may be situated;

IT IS FURTHER ORDERED that the Equity Receiver previously designated shall retain

custody, control and possession over all funds, assets and property within defendants; custody, control or po\ssession, including but not limited to, all books and records of account and original entry, all electronically stored data, all funds, securities, contents of safety deposit boxes, metals, currencies, coins, real or personal property, commodity futures trading accounts, trust accounts, and other assets, of whatever kind and nature, and wherever situated, and authorizing, empowering and directing such receiver to collect and take charge of and to hold and administer the same subject to further order of the Court, in order to prevent irreparable loss, damage and injury to customers and to conserve and prevent the dissipation of funds, provided, however, that the individual defendants who are natural persons shall be allowed to expend monies for ordinary, reasonable and necessary living expenses until further order of the court;

IT IS FURTHER ORDERED that this case be set for trial on a priority basis.

DATE: 19 February, 1992
/s/ Lloyd D. George
LLOYD D. GEORGE
United States District Judge

In the
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-S-92-041-LDG (LRL)

COMMODITY FUTURES TRADING COMMISSION,
Plaintiff,

v.

NOBLE METALS INTERNATIONAL, INC.,
MOORGATE LTD.,
RICHARD SCHULZE,
RICHARD D. PORTARO, JR.,
DONALD N. SHEFLER and
ROBERT S. BARTLETT,
Defendants.

TEMPORARY RESTRAINING ORDER

This matter is before the court on the plaintiff's motion for temporary restraining order and ancillary equitable relief (#2).

1. Facts

The plaintiff in this action, the Commodity Futures Trading Commission ("CFTC" or

"Commission"), is an independent regulatory agency of the United States charged with the administration and enforcement of the Provisions of the Commodity Exchange Act, 7 U.S.C. §§ 1 et seq. The defendants are corporate and individual parties whom the CFTC alleges 1) have been offering and selling off-exchange futures contracts to the public and 2) have been committing fraud in connection with those contracts, all in violation of the Commodity Exchange Act, 7 U.S.C. §§ 6(a) & 6(b).

In sum, the CFTC has alleged the following: 1) The Commodity Exchange Act requires that all commodity futures contracts be offered and sold on or subject to the rules of a board of trade which has been designated by the commission as a contract market and that those contracts be executed by or through a member of such contract market; 2) between 1989 and 1991, defendant Noble Metals, through its sales agent Moorgate Ltd and, among others, Moorgate salesman Donald Shefler and sales manager Richard Portaro, allegedly offered and sold to the general public certain "Forward Delivery Program" contracts which were, in essence, illegal off-exchange commodity futures contracts; 3) the victims of this scheme were allegedly solicited by the defendants by telephone calls which involved high-pressure. sales tactics including false, deceptive and misleading statements and 4) Noble continues to "service" these contracts, further

defrauding its customers out of substantial sums of money.

A hearing was held in this matter on January 21, 1992. At that hearing, defendants Noble, Moorgate, Schulze and Bartlett joined in opposition to the plaintiff's motion. Defendants Richard Portaro, Jr. and Donald Shefler also appeared at that hearing and personally opposed the relief requested by the CFTC, specifically the freezing of their personal assets, but offered no substantive opposition to this action. The court was unable to complete the hearing, due to other judicial commitments, but the relief requested by the CFTC was granted by the court for a period of ten days.

On February 3, 1992, a second hearing was held at which the Defendants renewed their opposition to the plaintiff's motion, At that time the court heard testimony from defendant Richard Schulze, who appears to be the mastermind behind the Noble program. Mr. Schulze described the Noble Forward Delivery Program and testified that it was designed specifically to avoid CFTC jurisdiction.

The CFTC, in response to arguments made by defense counseL and the testimony of Mr. Schulze, reiterated its position that the Forward Delivery Program contracts are commodities futures contracts subject to Commission

jurisdiction. The CFTC further argued that the defendants' assets should not be released to pay attorneys' fees, especially since the receiver has only been able to locate approximately; $250,000 in assets, although the defendants stand accused of defrauding customers out of approximately $10,000,000. However, the CFTC has indicated its intention to enter into a stipulation with defendants Portaro and Shefler with respect to the freeze of their personal assets, allowing those defendants necessary personal and business expenses.

2. Law

The court, having reviewed. the pleadings and considered the evidence and arguments presented at the hearings held in this matter, finds that the CFTC is likely to prevail on its claim that the defendants have been engaged in selling fraudulent off-exchange commodities futures contracts. Therefore, the temporary relief requested by the plaintiff is in order. The issue that seems to most suggest this result involves the "delivery" component of the Noble Metals Forward Delivery Program. A commodities futures contract, by definition, is entered into primarily for the purpose of assuming or shifting the risk of change in value of commodities, rather than for transferring ownership of the actual commodities, In Re Stovall., Com.Fut.L.Rep.(CCE) 20,941 (Dec. 6, 1979). The CFTC argues that legitimate

'delivery" of metal is never intended under the Forward Delivery Program contracts. The defendants claim that the Noble contracts contemplate actual delivery of metal.

The Commission has submitted numerous affidavits which suggest that Noble customers entered in to Forward Delivery Contracts because those contracts were represented as opportunities to speculate in precious metals. The affidavits submitted by the Commission further indicate that these Noble customers, on the strength of representations made by Noble and Moorgate salesmen, never expected any "physical delivery" of metal under their contracts.

Noble agrees that no physical delivery occurs, or is even intended. Instead, Noble insists that, upon a customer's request[14], a paper transfer of title to the purchased metals is effected, once the customer has paid the full purchase price under the contract, thus fulfilling the "delivery" requirement of the contract and removing the contracts from CFTC jurisdiction.[15]

---

[14]Noble does admit that, because the price of precious metals has dropped significantly since 1989, few, if any, Noble customers have requested delivery (obviously because they would be "buying" at a significant loss).

[15]In this regard, Noble indicates that over 200,000 ounces of silver have been 'delivered' in this fashion in their program. No documentation of these deliveries has been

The evidence before the court indicates that, in actual practice, Payment of the full purchase price can be avoided under the Noble program if a "third party" takes delivery for the customer. Noble, as a standard procedure, provides its customers with the names of "third party" agents who are.allegedly willing to "take delivery" of the customers' metal. The third party generally charges the customer the difference between the market price of the metal and the amount.of money required to extinguish the customer's obligations under the contract (virtually all of Noble's customers are in a loss position, due to recent decline in the price of precious metals).

The evidence before the court further suggests that the nominally independent "third parties" participating in this scheme are not independent at all, but rather are agents of defendant Richard Schulze, acting on his request and instruction. In essence, the third parties charge the Noble customers a fee to extinguish their obligations under their Noble contracts, or at least to relieve them of their immediate obligation to purchase and take delivery of the metal.[16] The amount of

---

provided. The CFTC suggests that a very small amount of metal held in a Rhode Island bank was used as the nominal subject of all of these paper transfers.

[16]There is some indication in the record that the third parties purport to "finance" the metal at the time delivery under the Forward Delivery Program contract is due,

the fee depends upon how much the customer actually "lost" due to the decline in the price of the metal he supposedly purchased.

The court has serious doubt about the legitimacy of the Forward Delivery Program contracts. The Ninth Circuit has observed,

> In determining whether a particular contract is a contract of sale of a commodity for future delivery for which the Commission has regulatory jurisdiction by virtue of 7 U,S,C. § 2 (1976), no bright-line definition or list of characterizing elements is determinative. The transaction must be viewed as a whole with a critical eye toward its underlying purpose. The contracts [in that case] represent speculative ventures in commodity futures which were marketed to those for whom delivery was not an expectation. Addressing these circumstances in the light of the legislative history of the Act, we conclude that [the defendant's] contracts are "contracts of sale of a commodity for future delivery." 7 U.S,C. § 2 (1976).

Commodity Fut. Trad. Com'n v. Co Petro Marketing, 680 F.2d 573, 581 (9th Cir. 1982). The Forward Delivery Program, when viewed as a

---

subsequently charging the Noble customers finance charges.

whole with a critical eye toward its underlying purpose, appears to be merely a ruse employed by the defendants in order to avoid operating within the bounds of the law.

First, there is a serious question in the court's mind whether sufficient quantities of metal actually exist and are under Noble's control to support the "delivery" obligations it has entered into with its customers. Because those obligations may be extinguished through a paper transfer, it is possible that no metal (or an insignificant amount of metal) is behind the nominal "title" that is transferred, again and again, to each of Noble's customers who request delivery. And, again, the 'delivery' requirement itself of the Forward Delivery Program contracts appears to be a mere ploy to avoid Commission jurisdiction. Indeed, the scheme as a whole seems to be nothing more than an ill-intended plan to avoid government regulation and defraud the public. Therefore, the temporary relief granted at the January 21, 1992 hearing will be extended.

Accordingly, for the reasons above stated,

IT IS ORDERED that the defendants, and any of their affiliates, agents, servants, employees, successors, attorneys and assigns, other persons or entities under their control, and all persons and entities in active concert or participation with them who receive actual notice of this order by

personal service or otherwise, are enjoined and restrained from directly or indirectly:

A. offering to enter into, entering into, executing, confirming the execution of, or conducting any office or business anywhere in the United States, its territories or possessions, for the purpose of soliciting or accepting any order for, or otherwise dealing in, any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery (other than a contract which is made on or subject to the rules of a board of trade, exchange or market located outside the United States, its territories, or possessions) unless

1. such transaction is conducted on or subject to the rules of a board of trade which has been designated by the Commission as a "contract market" for such commodity;

2. such contract is executed or consummated by or through a member of such contract market; and

3. such contract is evidenced by a record in writing which shows the date, the parties to such contract: and their addresses, the property covered and its price, and the terms of delivery; and willfully aiding and abetting the foregoing acts.

B. In or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof--cheating or defrauding or attempting to cheat or defraud such other person; and willfully aiding and abetting the foregoing acts;

IT IS FURTHER ORDERED that the assets of the defendants remain frozen and that the defendants and any of their affiliates, agents, servants, employees, successors, attorneys, assigns, any other persons or entities under their control, all persons and entities in active concert or participation with them, and all banks and financial institutions holding money on their behalf, who receive actual notice of this order by personal service or otherwise, shall be prohibited and restrained from directly or indirectly:

A. withdrawing, transferring, removing, dissipating, disposing of or otherwise secreting any funds, assets, or other property, wherever situated, including but not limited to any metals,

currencies, coins, commodity futures contracts (except for the liquidation of open positions by a registered futures commission merchant). funds or securities held on account or in safety deposit boxes at any financial institution or with any futures commission merchant, of any of the defendants, whether held ia the name of the defendants or otherwise, or within the custody, possession or control of any of the defendants herein; and

B. Destroying, altering, disposing of, mutilating or concealing, in any manner, any of the books, records, documents, or writings of any kind, or electronically stored data, or tape recordings, or other property of the defendants, whether maintained in the name of defendants or otherwise;

IT IS FURTHER ORDERED that representatives of the plaintiff continue to be allowed to inspect the books, records, electronically stored data, tape recordings, computer discs and other documents of defendants and their agents, wherever they may be situated and whether they are in the possession of the defendants or others, and to copy said documents, data and records either on ar off the premises wherever they may be situated:

IT IS FURTHER ORDERED that the Equity Receiver previously designated shall retain

custody, control and possession over all funds, assets and property within defendants' custody, control or possession, including but not limited to, all books and records of account and original entry, all electronically stored data, all funds, securities, contents of safety deposit boxes, metals, currencies, coins, real or personal property, commodity futures trading accounts, trust accounts, and other assets; of whatever kind and nature, and wherever situated, and authorizing, empowering and directing such receiver to collect and take charge of and to hold and administer the same subject to further order of the Court, in order to prevent irreparable loss, damage and injury to customers and to conserve and prevent the dissipation of funds, provided, however, that the individual defendants who are natural persons shall be allowed to expend monies for ordinary, reasonable and necessary living expenses until further order of the court;

IT IS FURTHER ORDERED that this order shall expire on February 18, 1992, unless further extended by order of this court or by consent of the parties.

DATE: 7 February 1992
/s/ Lloyd D. George
LLOYD D. GEORGE
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-S-92 041-LDG-LRL

COMMODITY FUTURES TRADING COMMISSION
Plaintiff

v.

NOBLE METALS INTERNATIONAL, INC.
MOORGATE LTD.
RICHARD SCHULZE
RICHARD D. PORTARO, JR.
DONALD N. SHEFLER
ROBERT S, BARTLETT
Defendants

UNDER SEAL
EX PARTE RESTRAINING ORDER

This cause having come before the Court on 16 January 1992, upon Plaintiff Commodity Futures Trading Commission's ("Commission") Motion for Ex Parte Restraining Order; the Court having considered the plaintiff's Complaint, Memorandum of Points and Authorities and supporting declarations, and other papers in support of plaintiff's Motion and having heard the arguments in support thereof; it appearing that

the Court has jurisdiction aver the parties and the subject matter of this case, and that the defendants, unless restrained are likely to withdraw, transfer, remove, dissipate, dispose of or otherwise secrete customer funds and the defendants may destroy, alter, dispose of or otherwise secrete books and records tending to establish violations of the Commodity Exchange Act, as amended, 7 U.S.C. §§ 1 et seq.; and the Court being otherwise fully advised in the premises:

IT IS HEREBY ORDERED that the assets of the defendants immediately be frozen and that the defendants and any of their affiliates, agents, servants, employees, successors, attorneys, assigns, any other persons or entities under their control, all persons and entities in active concert or participation with them, and all banks and financial institutions holding money on their behalf, who receive actual notice of this order by personal service or otherwise, shall be prohibited and restrained from directly or indirectly:

A. Withdrawing, transferring, removing, dissipating, concealing, disposing of or otherwise secreting any funds, assets, or other property, wherever situated, including but not limited to any metals, currencies, coins, commodity futures contracts (except for the liquidation of open positions by a registered futures commission

merchant), funds or securities held on account or in safety deposit boxes at any financial institution or with any futures commission merchant, of any of the defendants, whether held in the name of the defendants or otherwise, or within the custody, possession or control of any of the defendants herein; and

B. Destroying, altering, disposing of, mutilating or concealing, in any manner, any of the books, records, documents, or writings of any kind, or electronically stored data, or tape recordings, or other property of the defendants, whether maintained in the name of defendants or otherwise.

IT IS HEREBY FURTHER ORDERED that representatives of the plaintiff be allowed to immediately inspect the books, records electronically stored data, tape recordings, computer discs, and other documents of defendants and their agents, wherever they may be situated and whether they are in the possession of the defendants or others, and to copy said documents, data and records either on or off the premises wherever they may be situated.

IT IS HEREBY FURTHER ORDERED that an Ex Parte Equity Receiver shall take Into his immediate custody, control and possession:

A. All funds, assets, and property within defendants' custody, control or possession, including but not limited to all books and records of account and original entry, all electronically stored data, all funds, securities, contents of safety deposit boxes, metals, currencies, coins, real or personal property, commodity futures trading accounts, trust accounts, and other assets, of whatever kind and nature, and wherever situated, and authorizing, empowering and directing such receiver to collect and take charge of and to hold and administer the same subject to further order of the Court, in order to prevent irreparable loss, damage and injury to customers and to conserve and prevent the dissipation of funds.

IT IS HEREBY FURTHER ORDERED that no notice of this action should be given to the defendants prior to service of this Order upon all banks and financial institutions with which defendants maintain accounts.

IT IS HEREBY FURTHER ORDERED that this order shall expire on 22 January 1992, unless further extended by order of this court or by consent of the parties.

Done and ordered this 16 day of January, 1992.

/S/ Lloyd D. George
Lloyd D. George
Chief United States District Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-17285

COMMODITY FUTURES TRADING COMMISSION,
Plaintiff-Appellee,

v.

RICHARD SCHULZE,
Defendant-Appellant.

PETITION FOR REHEARING

Before: Stephen Reinhardt, David R. Thompson and Andrew J. Kleinfeld, Circuit Judges.

The petition for rehearing filed by appelant Richard Schulze on November 9, 1995 is DENIED.

The petition for rehearing filed by appellant Richard D. Portaro, Jr. on November 16, 1995 is DENIED.

THE COLORADO RESOLUTION

On April 7 and April 24, 1994, the Legislature of the State of Colorado adopted House Joint Resolution 94-1035, [Cf: APP 101] which addresses the conflict of federal vs. state power and which declares refusal to bend to improper federal mandates.

WHEREAS, The 10th Amendment to the Constitution of the United States reads as follows:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."; and

WHEREAS, The 10th Amendment defines the total scope of federal power as being that specifically granted by the United States Constitution and no more: and

WHEREAS, The scope of power defined by the 10th Amendment means that the federal government was created by the states specifically to be an agent of the states; and

WHEREAS, Today, in 1994, the states are demonstrably treated as agents of the federal government; and

WHEREAS, Numerous resolutions have been forwarded to the federal government by the Colorado General Assembly without any response or result from Congress or the federal government; and

WHEREAS, Many federal mandates are directly in violation of the 10th Amendment to the Constitution of the United States; and

WHEREAS, The United States Supreme Court has ruled in New York v. United States, 112 S. Ct. 2408 (1992), that Congress may not simply commandeer the legislative and regulatory processes of the states; and

WHEREAS, a number of proposals from previous administrations and some now pending from the present administration and from Congress may further violate the United States Constitution; now, therefore,

Be it Resolved by the House of Representatives of the Fifty-ninth General Assembly of the State of Colorado, the Senate concurring herein:

(1) That the State of Colorado hereby claims sovereignty under the 10th Amendment to the Constitution of the United States over all powers not otherwise enumerated and granted to the federal government by the United States Constitution;

(2) That this serve as Notice and Demand to the federal government, as our agent, to cease and desist, effective immediately, mandates that are beyond the scope of its constitutionally delegated powers.

Be it further resolved, That copies of this Resolution be sent to the President of the United States, the Speaker of the United States House of Representatives, the President of the United States Senate,the Speaker of the House and the President of the Senate of each state's legislature of the United States of America, and Colorado's Congressional delegation.

[Here ends the text of the Colorado Resolution.]

UNITED STATES CONSTITUTION
AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

7 U.S.C. Sec. 2a 1A

The term "future delivery," as used herein, shall not include any sale of any cash commodity for deferred shipment or delivery.

UNIFORM COMMERCIAL CODE
PERTINENT EXERPTS

All of the deliveries which were completed by Noble took place within the states of Colorado and Rhode Island. Both of those states have adopted the UCC, and the citations herein refer to those statutes of Colorado and Rhode Island which reflect the provisions of the Uniform Commercial Code as enacted into law by those states, and which are relevant to Noble and its business.

Colorado 4-2-106(1) and Rhode Island 6A-2-106(1) specify as follows:

> '...contract for sale' includes both a present sale of goods and a contract to sell goods at a future time. A 'sale' consists in the passing of title from the seller to the buyer for a price..."

CO 4-2-401(1) and RI 6A-2-401(1) specify in pertinent part as follows:

> ...Title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties...

CO 4-2-401(3)(a) and RI 6a-2-401(3)(a) specify in pertinent part as follows:

> ...Unless otherwise specifically agreed, where delivery is to be made

without moving the goods: (a) If the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents...

CO 4-1-201(9) and RI 6A-1-201(9) specify in pertinent part as follows:

...'Buyer in ordinary course of business' means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind.... 'Buying' may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a preexisting contract for sale...

CO 4-1-201(15) and RI 6A-1-201(15) specify as follows:

...'Document of title' includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title, a document must

purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

CO 4-1-201(14) and RI 6A-1-201(14) specify as follows:

> ...'Delivery' with respect to instruments, documents of title, chattel paper or securities means voluntary transfer of possession.

AGENCY

CO 4-1-202 and RI 6A-1-202 specify as follows:

> Prima facie evidence by third-party documents.
>
> - A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

CO 4-2-210(1)(2) and RI 6a-2-210(1)(2) specify as follows:

> ...(1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.
>
> (2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

CO 4-1-201(35) and RI 6A-1-201(35) specify in pertinent part as follows:

> 'Representative' includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.

Terms and Conditions of Sale,
Noble Metals International Inc.

1. CASH PURCHASE OR SALE. Customer may make a cash purchase or sale of bullion bearing hallmarks approved by the COMEX or NYMEX. Within three business days after receipt of full purchase price NOBLE will deliver the entire quantity of merchandise. Within three business days after receipt of bullion in good order per agreement NOBLE will make payment in full.

2. FORWARD DELIVERY PROGRAM. Customers may elect to purchase or sell bullion from or to the COMPANY pursuant to the Forward Delivery Program. ("FDP"). When the order is placed Customer pays an administrative fee. The administrative fee provides no equity for purchase in any merchandise. The sale of the bullion will be deemed to take place at the time of delivery of said bullion based upon clear funds received at that time. The Administrative Fee is a service fee only, and has the sole significance of compensating NOBLE for its commitment at current prices for bullion to be delivered at a later date. The Administrative Fee covers a two year period commencing on the date the order is placed. Customer at his election and upon providing notice to NOBLE may take or make delivery at any time during said period. If Customer does not elect to take or make delivery within the initial two year period, Customer, upon payment of an additional Administrative Fee, may extend for one year the time during which he must take or make delivery. The delivery time may be thus extended by Customer for a maximum of three such successive one year renewal periods, each renewal requiring an additional Administrative Fee to be paid before the expiration date of the prior period.

The requirement of making or taking delivery thus may not be extended beyond five years from the original entry date. NOBLE will employ its best efforts to notify Customer prior to the expiration of the initial two year period and any extensions, informing Customer that the delivery period is about to expire and reminding Customer of the alternatives as set forth above. However, failure by NOBLE to provide such notice shall not relieve Customer of his obligations as described herein. ALL CUSTOMERS ARE REQUIRED TO TAKE OR MAKE DELIVERY OF THE MERCHANDISE CONTRACTED. Delivery and transfer of title in return for payment are of the essence in the Forward Delivery Program. Prior to the delivery date, Customer must provide payment in full of the entire purchase price due to NOBLE or deliver acceptable hallmarked bullion as specified, as the case may be. This transaction cannot be liquidated through an offset, and Customer will be responsible for the full contract price notwithstanding any adverse market movements. Customer shall notify NOBLE in writing, giving at least three business days notice of the date Customer intends to make or take delivery. Such notice shall not be deemed to be received by or binding upon NOBLE until all amounts due or other obligations of Customer have been fully discharged. Within three business days after receipt of notice of intent to take delivery as herein described NOBLE will normally make delivery of the merchandise. Within three business days after delivery has been made by Customer to NOBLE of acceptable bullion per agreement, NOBLE will normally make payment in full.

3. NO ADDITIONAL FEES. This transaction does not constitute a futures contract, a leverage contract, a security, or an option. Therefore, there are no costs to Customer other than those

described, nor is there any provision in FDP for collateral calls or margin calls. All fees are deemed to be fully earned at the time they are assessed. Said fees are not prorated and consequently are nonrefundable.

4. PRICING POLICY. NOBLE attempts to establish its prices competitively. However, NOBLE does not warrant or represent that its prices are more or less favorable to Customer than the prices of other firms engaged in similar business. NOBLE acts as a principal in this transaction and does not have employees performing any clearing function or conducting business on a trading floor, or performing services as an auction or open outcry market. As the sole vendor under this program NOBLE acts on its own behalf and does not act as broker or agent for any other party.

5. DOCUMENTATION. Within three business days after entry into FDP and the receipt of clear funds, NOBLE will send to Customer confirmation of the transaction. All confirmations shall be conclusive in accordance with these Terms and Conditions of Purchase and Sale.

6. REMEDY IN CASE OF DEFAULT. Customer shall be liable for any unpaid obligations to NOBLE and for any bullion committed for delivery to NOBLE, including reasonable attorneys fees and the expenses of collection, including any action brought by NOBLE to recover unpaid or unsatisfied claims.

7. OBLIGATIONS OF THE COMPANY. Noble will not and therefore is under no obligation to repurchase any merchandise sold to Customer nor to assist Customer in the resale thereof, nor to provide to Customer bullion which is later to be

delivered by Customer to NOBLE. Upon request NOBLE may recommend other unaffiliated firms through which Customer may sell or procure bullion in furtherance of this transaction. However, the COMPANY's only obligation in connection with this transaction is to make or take delivery, as the case may be, of the specified merchandise to or from Customer or Customer's agent on the agreed delivery date. All transactions for or in connection with Customer's account may, at NOBLE's election, be deemed to be included in a single account, notwithstanding that such transactions may be segregated on NOBLE's books and records as separate accounts either severally or jointly with others.

8. PERFORMANCE AND LIMITED LIABILITY. In all transactions NOBLE acts as principal. No fiduciary relationship exists or is implied between NOBLE and Customer. The merchandise committed pursuant to this transaction is at Purchaser's expense and risk. NOBLE warrants the merchantability of all merchandise which it delivers. This warranty is limited, however, to prompt replacement of merchandise should it fail to meet specifications. There are no other warranties expressed or implied. NOBLE shall not be responsible for delays in communications due to breakdown or failure of transmission or communication facilities, or to any other cause beyond its control. Obligations of Purchaser shall be deemed satisfied solely upon receipt by NOBLE of clear funds or acceptable merchandise. By paying the Administrative Fee and by simultaneously committing to the purchase or sale of bullion, the Customer undertakes legal responsibility for the transaction.

9. NOTICES AND SOLE BASIS. Notices required shall be in writing, and shall be sent by registered mail, return receipt requested to

NOBLE at its designated address, or to Purchaser by regular first class mail at his or her most recent address appearing in existing account documentation, or to such other address as NOBLE or Purchaser may give the other in writing. These Terms and Conditions constitute the sole and entire basis on which this transaction shall be governed. No person has been authorized by NOBLE to alter or modify such terms or to make any statements or representations at variance or inconsistent therewith. In entering upon this transaction, Purchaser acknowledges that he or she has not relied upon any such inconsistent statement or representation.

10. ADD ONS. Any sales, customs, value added, export, or other tax duty in respect to the transactions contemplated herein which may be imposed by the United States or any other state or municipal, or political sudivision thereof, or by any foreign jurisdiction, if paid or required to be paid by NOBLE, shall be added to the purchase price of the merchandise and billed to Purchaser, who shall be solely responsible for the same.

11. OVERDUE BALANCES. Prompt payment of all obligations is of the essence in the Forward Delivery Program. Any obligations not met by Customer on or before their respective due dates shall be subject to late charges, to be accrued daily on the unpaid balance at a rate computed to correspond to an annualized rate 2% (two percent) above the then current Federal Funds Rate. Upon notice, NOBLE will normally make delivery or take delivery within three business days after receipt of such notice, contingent upon simultaneous payment of all due balances. Should delivery for any reason require longer than three business days for completion, NOBLE will guarantee the Customer against any market loss caused by the

delay. In order to reckon the dollar amount ofsuch market loss, NOBLE will determine the lowest New York closing price during the normal three day period and compare it with the closing price on the day of actual delivery. If such comparison discloses a market loss to the Customer, NOBLE will immediately remit such amount to the Customer. If the price comparison reveals a market gain due to the delay, NOBLE will make no additional assessment against the Customer. Insurance, shipping, and storage will be at the Customer's expense and risk. It is possible that at a time of sharp increases or decreases in bullion prices the bullion industry would be so saturated with delivery requests that purchaser demands for delivery of bullion would exceed the industry's physical capabilities. In such a case, NOBLE will make and take delivery on a first come first served basis.

12. NONTRANSFERABILITY. FDP purchases and sales are not transferable, and may not be abrogated by the Customer, who will be personally liable for the completion of the transaction. Liability for purchase or sale will pass upon a purchaser's death or incompetence to his or her estate, either by will or under the laws of descent, and will be binding upon his or her heirs. The program is otherwise not transferable. Liquidation can only be effected through physical delivery of bullion metal. FDP Customers do not acquire any equity interest in NOBLE or its investment accounts, and will have no voice in NOBLE'S management. Subscriptions once submitted are irrevocable, but NOBLE reserves the right at its sole discretion to accept or reject any subscription with or without stated cause.

13. DELIVERY. Delivery of all merchandise specified shall be made at the Company's place of business or other location within the United

States designated by NOBLE. Shipments to or from other locations will be at Customer's expense and risk. Delivery by NOBLE shall be deemed complete (a) upon delivery to Customer or Customer's agent if Customer takes delivery at Company's duly designated delivery location or (b) upon placement of the specified merchandise on board a designated common carrier. Delivery to NOBLE shall be deemed complete upon receipt in good order of bullion bearing COMEX or NYMEX approved hallmarks in the full quantities and qualities specified. NOBLE deals in cast bullion ingot bars which are fabricated by refiners in various nominal weights. Delivery will therefore be subject to such weight variations, and the final price will be adjusted to reflect the exact weight of the specific bars to be delivered. The Company reserves the right to deliver bars in such individual weights as in NOBLE's sole discretion are consistent with the aggregate weight ordered. Customer may, however, specify bars of specific nominal weights or hallmarks. If Customer specifies such nominal weights or hallmarks, Customer will be required to make additional payment to cover the costs, if any, arising from such price premiums as may be applicable to the bar weight or hallmarks so specified, and the timely delivery of such individually specified bars will be subject to market availability and NOBLE's current inventory status. NOBLE warrants that all bullion delivered will bear a hallmark recognized by the Commodity Exchange Inc. (COMEX) or the New York Mercantile Exchange (NYMEX) and will be of the proper weight and purity as specified thereon.

14. TAX LIABILITY. To ascertain proper tax treatment for any earnings from the Forward Delivery Program, Customer should consult his or her own tax advisor, since NOBLE does not offer tax advice. Any and all foreign, federal, state, or

local tax obligations arising from this transaction shall be the sole responsibility of Customer.

15. RESOLUTION OF DISPUTES. All actions or proceedings arising directly or indirectly in connection with this transaction, including any court action or arbitration proceeding shall be litigated or otherwise heard pursuant to these Terms and Conditions of Purchase and Sale only before tribunals, courts, or other governmental bodies having jurisdiction over the subject matter of the controversy, within venues located within metropolitan Des Moines, Iowa. Customer in entering into this transaction will be obliged to bring and hold any such proceeding in the said venue, and to transfer upon NOBLE's demand any such proceeding to the said venue. Any expenses incurred by Customer and/or his witnesses in and around Des Moines, Iowa to attend such proceeding shall be borne by Customer without any right of reimbursement from NOBLE. Customer will have no right to transfer such proceeding or enforcement thereof to, nor to have the same heard by, any tribunal or governmental body not sitting in the said venue.

16. JURISDICTION. This transaction and any controversy arising therefrom shall be interpreted and governed under the laws of the State of Iowa.

OTHER ESSENTIAL MATERIAL

Terms and Conditions of Sale,
Wynwood Mercantile Corp.

1. CASH PURCHASE: Purchaser may make a cash purchase of merchandise offered for sale by WYNWOOD. Within 3 business days OF receipt of full purchase price of the merchandise, WYNWOOD will make delivery of the entire quantity of merchandise.

2. EXTENDED DELIVERY PROGRAM: (a) Purchaser may elect to purchase merchandise from WYNWOOD pursuant to WYNWOOD's Extended Delivery Program. When the order is placed Purchaser pays a portion of the purchase price as a down payment, the balance of which is to be paid prior to delivery. In addition to the down payment, when the order is placed, Purchaser pays to WYNWOOD an administrative fee. Unlike the down payment, the administrative fee is not credited against the purchase price and provides no equity for Purchaser in any merchandise. (b) The administrative fee covers a two year period commencing on the date the order is placed. Purchaser, at his election, and upon providing notice to WYNWOOD, may take delivery at any time during that period. If Purchaser does not elect to take delivery within the initial two year period, Purchaser, upon payment of an additional administrative fee, may extend for one year the time period during which he must take delivery. The delivery time may be extended by Purchaser for a maximum of five such successive one year renewal periods, each renewal requiring an additional administrative fee to be paid before the expiration date of the prior period. The requirement of taking delivery may not be extended beyond seven years from the original contract date. Wynwood will send notices to the

Purchaser prior to the expiration of the initial two year period and any extensions, informing Customer that the delivery period is about to expire and reminding Customer of the alternatives as set forth above. ALL PURCHASERS, WHETHER OBTAINING MERCHANDISE THROUGH THE CASH PURCHASE METHOD OR THE EXTENDED DELIVERY PROGRAM, ARE REQUIRED TO TAKE DELIVERY OF THE MERCHANDISE ORDERED. Delivery and transfer of title in return for payment are of the essence of this purchase agreement. Prior to the delivery date, Purchaser must provide payment in full of the entire outstanding balance due to Wynwood. This transaction cannot be liquidated through an offset, and Purchaser will be responsible for the full purchase price notwithstanding a decline in the market value of the merchandise. Purchaser shall notify WYNWOOD in writing, giving at least three business days notice of the date Purchaser intends to take delivery. Such notice shall not be deemed to be received or binding upon WYNWOOD until all amounts due from Purcxhaser have been received by WYNWOOD in the form of clear funds. Within three business days after receipt of notice of intent to take delivery as described in this paragraph, WYNWOOD shall make delivery of the merchandise ordered.

3. NO ADDITIONAL FEES. This purchase does not constitute a futures contract, a leverage contract, or an option. Therefore, there are no costs to Purchaser other than those described above. All fees are deemed to be fully earned at the time they are assessed. Said fees are not prorated and consequently are nonrefundable.

4. PRICING POLICY. WYNWOOD attempts to establish its prices competitively. However, WYNWOOD does not warrant or represent that its

prices are more or less favorable to Purchaser than the prices of other firms engaged in similar business. WYNWOOD acts as A principal in this transaction and does not have employees performing any clearing function or conducting business on a trading floor, or performing services as an auction or open outcry market. As the sole vendor under this Purchase Agreement, WYNWOOD acts on its own behalf, and does not act as broker or agent for any other party.

5. DOCUMENTATION. Within three business days after entry into Extended Delivery Program and receipt of clear funds, WYNWOOD will send to Purchaser an Acknowledgement, confirming all the terms of sale. All Acknowledgments and Invoices shall be conclusive, in accordance with these Terms and Conditions of Sale.

6. REMEDY IN CASE OF DEFAULT. Purchaser shall be liable for any unpaid portion of his obligations to WYNWOOD, including reasonable attorneys fees, and the expenses of the costs of collection, including any action brought by WYNWOOD to recover unpaid balances.

7. OBLIGATIONS OF WYNWOOD. WYNWOOD is under no obligation to repurchase any merchandise sold to Customer nor is WYNWOOD under any obligation to assist Customer in the resale of any merchandise. However, WYNWOOD's only obligation in connection with the transaction is to deliver the specified merchandise to Purchaser or Purchaser's agent on the agreed delivery date. All transactions for, or in connection with, Purchaser's account may, at WYNWOOD's option, be deemed included in a single account, notwithstanding that such transactions may be segregated on WYNWOOD's records as separate accounts either severally or jointly with others.

8. PERFORMANCE AND LIMITED LIABILITY. (a) In all transactions, WYNWOOD acts as principal. No fiduciary relationship exists or is implied between wynwood and Purchaser. Purchaser acknowledges that the merchandise ordered pursuant to this transaction is at Purchaser's expense and risk. WYNWOOD's liability is limited to the replacement of merchandise should it fail to meet specifications. There are no other warranties expressed or implied. WYNWOOD shall not be responsible for delays in the transmission of documents or for delays in communications due to the breakdown or failure of transmission or communication facilities, or to any other cause beyond WYNWOOD's control. Obligations of Purchaser to WYNWOOD shall be deemed satisfied solely upon receipt by WYNWOOD of clear funds. (b) Notices required shall be in writing, and shall be sent by registered mail, return receipt requested, to WYNWOOD at its designated address, or to Purchaser by regular mail at his or her most recent address appearing in existing account documentation, or to such other address as WYNWOOD or Purchaser may give the other in writing. © These Terms and Conditions constitute the sole and entire basis on which this transaction shall be governed. No person has been authorized by WYNWOOD to alter or modify such terms, or to make any statements or representations at variance or inconsistent therewith. Purchaser acknowledges that he or she has not relied upon any such inconsistent statement or representation.

9. ADD ONS. Any sales, customs, value added, export, or other tax or duty in respect to the transactions contemplated herein, which may be imposed by the United States or any other state, municipal, or political sudivision thereof, or by any foreign jurisdiction, if paid or required to

be paid by WYNWOOD, shall be added to the purchase price of the merchandise and billed to Purchaser.

10. DELIVERY. Delivery of the merchandise ordered will be made either (a) at WYNWOOD'S place of business or other location within the U.S. Designated by WYNWWOD, or (b) at such other place, destination, or storage place as Purchaser may designate in writing, such alternate delivery to be at Purchaser's expense and risk. Delivery by WYNWOOD shall be deemed to be complete (a) upon delivery to Purchaser or Purchaser's agent if Purchaser takes delivery at WYNWOOD's place of business or other location designated by WYNWOOD, or (b) upon placement of the specified merchandise on board a designated common carrier. WYNWOOD deals in cast bullion ingot bars which are fabricated by refiners in various nominal weights. In actual practice, however, such bars may vary either upwards or downwards from the nominal weights. Delivery by WYNWOOD will therefore be subject to such weight variations, and the final price to be paid by Purchaser will be adjusted as per the exact weight of the actual bars to be delivered. WYNWOOD reserves the right to deliver bars in such individual weights as in the Company's sole discretion are consistent with the aggregate weight ordered. Purchaser may, however, specify bars of specific individual weights or hallmarks. Purchaser may be required to make additional payment to cover the costs, if any, arising from such price premiums as may be applicable to the bar weights or hallmarks so specified, and the timely delivery of such individually specified bars will be subject to market availability and WYNWOOD's current inventory status.

11. TAX LIABILITY. To ascertain whether any earnings from WYNWOOD's Extended Delivery

Program may be eligible for long term capital gains treatment, Purchaser should consult his or her own tax advisor, since the Company does not offer tax advice. Any and all foreign, federal, state, or local tax obligations arising from this transaction shall be the sole responsibility of Purchaser.

12. RESOLUTION OF DISPUTES. All actions or proceedings arising directly or indirectly in connection with this transaction, including any court action or arbitration proceeding shall be litigated or otherwise heard pursuant to these Terms and Conditions of Purchase and Sale only before tribunals, courts, or other governmental bodies having jurisdiction over the subject matter of the controversy, within venues located within Broward County, Florida. Customer in entering into this transaction will be obliged to bring and hold any such proceeding in the said venue, and to transfer upon the Company's demand any such proceeding to the said venue. Any expenses incurred by Customer and/or his witnesses in and around Broward County, Florida to attend such proceeding shall be borne by Customer without any right of reimbursement from the Company. Customer will have no right to transfer such proceeding or enforcement thereof to, nor to have the same heard by, any tribunal or governmental body not sitting in the said venue.

13. JURISDICTION. This transaction and any controversy arising therefrom shall be interpreted and governed byr the laws of the State of Florida.